Agenda Item B – Document Index

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1. Gilbert Motion for Removal of Hearing Officer <u>Attachments</u> 1a. Hearing Officer's Ruling and Order on MSDs 1b. Gilbert Response Objecting to IPCs MSD on Issue LU-5 1c. Union County Forest CFAC Chart 1993	7/26/2021
2. Ms. Gilbert Email to Service List	7/22/2021
3. Ms. Gilbert Email to Service List <u>Attachments</u> 3a. Hearing Officer's Ruling and Order on Issues N-1, N-2, and N-3	7/29/2021
4. Ms. Gilbert's Request for Reconsideration of Ruling on Issue LU-5	7/28/2021
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"Shaded" cell represents primary document for Agenda Item B

To: Energy Facility Siting Council Members and July 26, 2021

Janine Benner, Director

Oregon Department of Energy

I believe this document must be provided to all contested case participants to avoid it being considered "ex-parte communications. It is being provided to all petitioners, the Oregon Energy Facility Siting Council Members, Janine Benner, and Todd Cornett, supervisor of the Oregon Department of Energy Siting Department.

I am filing the following motion as allowed by OAR 345-015-0023(7). I am requesting that the Council remove Ms. Allison Greene Webster as hearings officer for the Boardman to Hemingway Transmission line contested case process. Ms. Webster has provided documentation through her actions on an ongoing and continuing basis proving her bias against petitioners in the contested cases related to the Boardman to Hemingway transmission line. In the event that her decisions were not based on bias, her failure to follow the rules describing accepted procedures and application of the rules for conducting contested cases must be treated as incompetence. Either reason requires that she be removed from the role of hearings officer.

The examples in this document show that Ms. Green has not complied with

OAR 345-015-0023(2)(a) and (b) which require her to "take all necessary action to ensure a full, fair and impartial hearing" and "facilitate presentation of evidence " Her failure to meet these requirements necessitate this request that she be removed from her involvement with the B2H contested case process.

She has ignored rules and statutes when doing so benefitted the Oregon Department of Energy and Idaho Power, issued orders and implement procedures that disadvantaged the public and for many have pushed them out of the opportunity to argue their contested cases. Below is a partial listing of the actions that have resulted in this request.

I am presenting evidence for council review in the form of questions and answers when possible. The file clearly shows that whenever Ms. Webster believed that

she had discretionary power, she made decisions intended to disadvantage the public. In other instances, she waived Oregon Rules and Statutes in order to make findings in support of the Department and Idaho Power. While I can provide multiple examples to document my comments, I will provide at least one. I will be happy to submit additional examples if requested to do so by the Energy Facility Siting Council .

Concerns regarding Ms. Webster's bias against the public began from the initial actions she took on the contested cases and her process for identifying issues allowed contested cases. As the process has moved forward, those concerns have been confirmed on a continuing basis. The following pages establish overwhelming evidence, but far from all the evidence regarding the need to remove Ms. Webster due to prejudicial actions.

1. Why did she follow the recommendations of the Oregon Department of Energy on virtually every issue she threw out during the initial decisions regarding what contested cases would be allowed to move forward? Why didn't she make these decisions herself?
2. Why did she allow the Oregon Department of Energy to write the issue statement for all the hearings requests? Allowing the agency who's actions are the reason for the contested cases to define the limits to the arguments against them clearly prejudices the contested cases as such limits clearly benefit the respondent. ODOE stated in their submission of the issues that they did not include changes or issues which they did not support.
3. Why did the hearings officer agree to limit the issues to only the specific statements that the petitioners made in their public comments rather than allowing them to address the "issue" they raised ? The courts have stated that the "raise it or waive it" rule only requires that the issue be raised and also that there is no requirement to list the rule or statute that addresses the issue. Ms. Webster supported ODOE in limiting to the greatest extent possible the statement of issues to only the specific part of the issue the person directly commented on in their public comments.
    i. An example: My issue NC-5 was rewritten by ODOE to read: "Whether the revisions in the Proposed Order, Section IV.Q.l,

Noise Control Regulation (Methods and Assumptions for Corona Noise Analysis) are inaccurate, specifically, the use of the 12:00 a.m. to 5:00 a.m. timeframe to establish ambient noise levels." My issue actually was that the revisions that were made were inaccurate and the reference to the use of the time between 12:00 a.m. and 5:00 a.m. was provided as an example of one of the inaccuracies. The definitions in the DEQ noise rules define the period to be used as 24 hrs. I did not respond to the Summary Determination request that this issue be dropped. It had already been made meaningless due to the limitation ODOE placed on it and which Ms. Webster included in her order.

4. Why did the hearings officer agree to allow full party status for the Oregon Department of Energy and Idaho Power and limit all other participants to limited party status? While she believes she has the "legal" right to do so, this action fails to represent a fulfillment of her duties to provide a fair process. This is especially troublesome when she allowed the Oregon Department of Energy to narrowly define the contested case issues and then would not allow participants to comment on anything that was not included in these narrow statements of issues. The "legality" of her decision is highly questionable, and the Oregon Supreme Court decision in "Friends of the Columbia Gorge vs Energy Facility Siting Council No. EFSC 1-2020 supported the objections by the petitioners which were overruled which determined that limiting participation for each party in a contested case solely to the issues raised by that party violates the APA rules.

   Denying full party status to STOP B2H when they represent hundreds of individuals and multiple non-profits is an egregious example of using this limitation to prejudice the proceedings against the public. There was no possible way that this non-profit could have requested contested cases on all the issues of concern for their members in the timeframes allowed. Her decisions on party status were used as a tool recommended by the department and Idaho Power to place a barrier before STOP B2H in their efforts to represent their members.

5. The hearings officer gave both ODOE and Idaho Power full party status allowing them to respond to all issues being argued by petitioners. and providing them with another advantage in arguing against the public's contested cases. No matter what reasons this hearings officer gives to justify her behavior and decisions, there is no possibility that Ms. Webster can claim that she was not aware of the fact that her decisions favored the respondents and created a disadvantage to the petitioners.. At any point in the contested case process Ms. Webster could have decided to stop making discriminatory decisions. She could have started making an effort to provide for a fair evaluation of the contested cases. She chose not to do this.
6. Why did the hearings officer allow the department to define processes prior to her implementing them by use of "Requests for Clarification" and fail to issue the requested order indicating that this should not continue?
    a. I submitted the document: "Response to ODOE Request for Clarification" objecting to ODOE's use of motions for "clarification" of process prior to one being issued and requesting that Patrick Rowe not be able to function as counsel representing ODOE, the Council and the DOJ. Then Ms. Webster adopted the process ODOE described with no opportunity for the public to also provide input and failed to address the fact that petitioners had questioned why Mr. Rowe was being allowed to wear multiple hats.
7. Multiple informal requests for responses to discovery questions were sent to the Oregon Department of Energy and Idaho Power. Petitioners found many responses to their questions to be inadequate or incomplete and asked the hearings officer to issue orders requiring them to respond. All of the public's requests for orders compelling responses to discovery from ODOE and Idaho Power were denied. It is extremely difficult to believe that all responses by ODOE and Idaho Power were complete. It becomes impossible to believe given all the other decisions made against the public.

8. Why did Ms. Webster consistently support motions from the Oregon Department of Energy and Idaho Power in spite of objections from the petitioners that the motions would predudice the public?
    i. Example: The Oregon Department of Energy requested that a computer file they created that contained all the documents they had be the resource that everyone use to reference the material they compiled and that they be required to reference the material in the way ODOE recommended. The petitioners objected to this, however, the ALJ ordered that it be done. Petitioners identified multiple errors, gliches, areas where the ODOE files failed to work as promised, and objected due to the fact that the use of these files was prejudicial toward the many petitioners who do not have expertise in the use of computer files, even if they had not been defective. Ms. Webster refused to allow petitioners to use the normally accepted methods of referencing exhibits in civil and quasi-legal proceedings. She should have allowed typical methods of referencing documents based on the Bluebook or ALWD Rules of citation, however she is requiring a method and the use of a document that is specific to ODOE and no one else. Ms. Webster's insistence that the ODOE recommendation is the only method she will accept has literally caused petitioners to give up pursuing their contested cases. I spent many hrs. trying to work with the ODOE files, but have been unsuccessful in being able to find information within a reasonable period of time. The files are so difficult to work with that I did not have time to espond to all the Summary Determination requests that ODOE and Idaho Power filed against me. Evidence supporting this can be found by reading the multiple page directions on how the files are to be accessed and listening to the recording that Ms. Tardiweather made of the training she tried to provide to us two days before our answers to the Summary Determination responses were due and for which we were required to use this file. During the training, Ms.

Tardiweather found that the files did not work the way she thought they did, and the questions and comments during the training clearly show the level of confusion and frustration that Ms. Websters demands created.

9. There are ongoing "simple" changes to accepted procedures in contested and civil cases that she has made, and each of them created an additional problem, cost or time demand on the petitioners. One of these is the fact that petitioners have been required to have their affidavits regarding their exhibits notarized. Finding and paying for someone to notorize documents such as this is an example of the kinds of "hidden" requirements that Ms. Webster has inserted into the process to make participation increasingly difficult for the public. Ms. Webster certainly should be aware of the fact that the UTCR only requires affidavits to be notarized when it is specifically mandated by statute.
10. The most recent action demonstrating Ms. Webster's clear efforts to create a disadvantage for petitioners is the authorization for the use of Summary Determinations, and the clearly prejudicial rulings on the cases going against the petitioners and their issues. The department and Idaho power made a total of 36 requests, and the use of Summary Determinations to throw out contested cases does not appear for council review as the cases are denied ever being heard. It is highly predictable that if it is allowed to continue, she will approve all 36 requests and none of these issues will be allowed a contested case. There are multiple prejudicial actions involved with the Summary Determination requests including the fact that the attorney for ODOE initially asked for and signed the approval of an order allowing this procedure. The actual Attorney General then rescended this order and reissued an order that excluded Summary Determination stating that the issue needed to be addressed through the petitioners, hearings officer and Council. The issue was never brought before the counsel and was objected to by petitioners, however, the hearings officer included it in her procedure and used the same rules that the Attorney General said were not approved for use and absent any rule or statute that authorizes its use by the

Council. These rules are very specific and approving one requires there to be NO ISSUE OF LAW OR FACT THAT IS ARGUABLE. The first 15 orders Ms. Webster has issued all end the contested case issues she is ruling on. It appears that she intends to throw out all 36 issues.

i. An example of the kinds of decisions on Summary Determinations that are being issued by Ms. Webster is my contested case LU-5 arguing that Idaho Power failed to identify all the forest land in Union County by the use of the Union County Rules rather than the State Statutes. I am attaching Ms Websters order as well as my response objecting to her issuing an order supporting a summary determination. Any attorney can review these two documents and identify multiple areas where the hearings officer made inaccurate statements, and waived state law in her order. I am attaching the list of some of the areas where there clearly are issues of fact and law that need to be heard in a contested case.

OAR 345-015-0023(2)(a) and (b) require her to "take all necessary action to ensure a full, fair and impartial hearing" and "facilitate presentation of evidence".

The attorney made no effort to meet the requirements of the above rule and related statute in her role as hearings office. In fact, her actions and decisions on a consistent and ongoing basis show that she made every effort to avoid allowing the public a fair and impartial hearings process. She placed barrier after barrier before the petitioners that made it difficult and often impossible for them to be able to make their arguments, or obtain and present their evidence.

Her behavior and decisions when functioning in the hearings officer role showed ongoing and consistent deference to the department and the developer and when all the actions are considered cumulatively show an undeniable pattern of prejudicial behavior. It is clearly documented that the hearings officer has created a situation that makes the entire contested case process questionable in the event it is allowed to continue.

I have included with this document only a fraction of the evidence of misconduct on the part of the hearings officer available in the record of this contested case. The contested case procedure has been focused on creating a situation that has been intimidating, stressful, and predictably focused on making all decisions be made in a manner that is advantageous to the department and Idaho Power at the expense of the public.

REQUESTED COUNCIL ACTION:

Immediate removal of Ms. Greene Webster from any further involvement with this contested case. Void all actions taken by Ms. Green as a result of the use of Determinations and her orders related to those requests.

ADDITIONAL REQUEST:

I request that Hanley Jenkins not be allowed to participate in determining the response to this request. I was the Legal Research Analyst for the Friends of the Grande Ronde Valley when they requested that he be investigated by the Oregon Department of Justice due to a co-worker indicating he destroyed public records regarding a Wind Farm Application he was working on. The DOJ was not able to document criminal action, however, Mr. Jenkins was given a letter of reprimand for his actions and there was a significant amount of local news coverage of the investigation and outcomes. In addition, I was one of the people who objected to Mr. Jenkins being allowed to serve on the Energy Facility Siting Council when he was first nominated. I believe this history with Mr. Jenkins is more than adequate to support my concern that Mr. Jenkins may allow this history to cloud his objective evaluation of my request.

In the interests of providing outcomes that are defensible, I am also recommending the following:

1. That two hearings officers jointly manage the Contested Case procedures and issuance of orders for the B2H project given the complexity of the project and significant number of contested cases. I suggest that the Department recommend one of the hearings officers and the petitioners identify the second. Both should have their time paid for by the respondent. , or in the alternative, if only one hearings officer is used, that

the petitioners recommend two or three candidates and the Council identify one from that list. This would help address public concern that the actions that have been occurring with Ms. Webster Green could continue under another hearings officer.

In summary:

There were over 100 contested case requests. I doubt that you could find a single person involved in this contested case process that is not certain that the hearings officer made decisions with the intent of providing an advantage to the department and the developer and who are not convinced that the outcomes are predetermined by the hearings officer to go against the public. I, personally, have abandoned any effort at civility with this hearings officer due to her unwillingness to adhere to the rules of conduct she is supposed to follow. Whether her actions result from a lack of knowledge or ethics, she needs to be removed from the position of hearings officer.

Irene Gilbert

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Attachments:

--My objection to the issuance of a Summary Determination throwing out my issue LU-5

--Ms. Webster Green's order throwing LU-5 out

--My draft listing of some of the inaccurate statements supporting Ms. Webster's decision and areas where she waived state rules and statutes in this order.

--The 1993 list of cubic feet per acre per year of timber production showing that most of the land in the combined agriculture/forest zone had no soils capacity identified and only those with a rating of 63 or greater were treated as forest land.

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF ENERGY

IN THE MATTER OF:	)	**RULING AND ORDER ON MOTION**
	)	**FOR SUMMARY DETERMINATION**
THE APPLICATION FOR SITE	)	**OF CONTESTED CASE ISSUES LU-2,**
CERTIFICATE FOR THE	)	**LU-3, LU-5 AND LU-6**
BOARDMAN TO HEMINGWAY	)	
TRANSMISSION LINE	)	OAH Case No. 2019-ABC-02833

INTRODUCTION

On May 28, 2021, in accordance with the January 14, 2021 *Order on Case Management Matters and Contested Case Schedule* (*Case Management Order)* and OAR 137-003-0580, Applicant Idaho Power Company (Applicant or Idaho Power) filed a Motion for Summary Determination of Contested Case Issues LU-1, LU-2, LU-3, LU-5 and LU-6, seeking summary determination in its favor on certain land use standard (LU) issues in this contested case.[1]

In the *Amended Order on Party Status*, Kathryn Andrew was granted status as a limited party with standing on Issues LU-2 and L-3.[2] Irene Gilbert was granted status as a limited party with standing on Issues LU-5 and LU-6.[3] This ruling addresses Idaho Power's request for a favorable ruling as a matter of law on Contested Case Issues LU-2, LU-3, LU-5 and LU-6.[4]

On June 25, 2021, Ms. Andrew filed a Response Objecting to Idaho Power's Motion for Summary Determination Regarding Contested Case Issue LU-3 (Andrew LU-3 Response). Ms. Andrew did not file a response addressing Idaho Power's motion regarding Issue LU-2. Also on June 25, 2021, Ms. Gilbert filed a Response Objecting to Idaho Power's Motion for Summary Determination Regarding Issue LU-5 (Gilbert LU-5 Response). Ms. Gilbert did not file a

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[1] The issues to be considered in this contested case pursuant to ORS 469.370(3) and OAR 345-015-0016(3) are set out in the table at pages 77-82 of the *Amended Order on Party Status, Authorized Representatives and Properly Raised Issues for Contested Case* (*Amended Order on Party Status*) issued December 4, 2020, and restated in the Table of Identified Issues incorporated into the *Order on Case Management* at pages 3-8.

[2] Ms. Andrew was also granted limited party status on Issue R-3, an issue that is not subject to a motion for summary determination.

[3] Ms. Gilbert was also granted status as a limited party on 13 other issues, 3 of which are subject to motions for summary determination (M-2, FW-4, and NC-5) and 10 of which are not subject to a motion for summary determination (FW-3, FW-5, HCA-3, LU-7, LU-8, LU-11, NC-2, PS-5, R-3, and RFA-1).

[4] Issue LU-1 was withdrawn pursuant to an Acknowledgement of Withdrawal of Limited Party Eastern Oregon University and Contested Case Issues LU-1 and FW-2 issued June 29, 2021.

response regarding Issue LU-6.

The Department timely filed a response to Idaho Power's request for a favorable ruling on Issues LU-2, LU-3, LU-5 and LU-6 supporting Idaho Power's motion on these four issues (Department Response).

On July 9, 2021, Idaho Power filed a Reply to Limited Parties' Responses to Idaho Power's Motion for Summary Determination of Contested Case Issues LU-2, LU-3, LU-5 and LU-6.

ISSUES

1. Whether Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-2: Whether Applicant erred in calculating the percentage of forest land in Umatilla and Union Counties, thereby underestimating and misrepresenting the amount of potentially impacted forestland.

2. Whether Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-3: Whether Applicant's analysis of forestland impacts failed to consider all lands defined as Forest Land under state law, thereby misrepresenting forest land acreage.

3. Whether Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-5: Whether calculation of forest lands must be based on soil class or whether it is sufficient to consider acreage where forest is predominant use.

4. Whether Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-6: Whether the alternatives analysis under ORS 215.275 included all relevant farmland.

DOCUMENTS CONSIDERED

In making the determinations herein, the ALJ considered the following documents:

1. Applicant Idaho Power Company's Motion for Summary Determination of Contested Case Issues LU-1, LU-2, LU-3, LU-5 and LU-6 (Motion); Exhibit A to the Motion (consisting of the Affidavit of Jocelyn Pease and Attachments 1 through 3); Exhibit B to the Motion (consisting of the Affidavit of Scott Flinders and Attachment 1 through 4);

2. The Department's Response;

3. Kathryn Andrew's Response Objecting to Idaho Power's Motion Regarding Issue LU-3; the Affidavit of Kathryn Andrew dated June 25, 2021, with attached exhibits, including a certified copy of the Deposition of Scott Hartell;

4. Kathryn Andrew's August 27, 2020 Petition for Party Status (Andrew Petition);

5. Irene Gilbert's Response Objecting to Idaho Power's Motion Regarding Issue LU-5; the Affidavit of Irene Gilbert dated June 25, 2021, with attached exhibits, including a certified copy of the Deposition of Scott Hartell;

6. Irene Gilbert's August 27, 2020 Petition for Party Status (Gilbert Petition);

7. Idaho Power's Reply; and

8. Identified documents in the Decision-Making and Administrative Project Record for the Boardman to Hemingway Transmission Line (B2H Project Record).[5]

UNDISPUTED FACTS

1. In Oregon, the proposed project area for the Boardman to Hemingway transmission line (B2H Project) crosses forest-related land use zones in Umatilla County and Union County. In Umatilla County, the project crosses land in the Grazing-Farm Zone (GF Zone). The GF Zone is a hybrid farm-forest zone that includes agricultural land, rangeland, and forestland. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 42.)

2. In Union County, the proposed transmission line crosses land in the Timber-Grazing Zone. The Timber-Grazing Zone is also a hybrid farm-forest zone that includes farmland, rangeland, and forestland. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 42.)

3. Because the project area in Umatilla and Union Counties crosses hybrid farm-forest zoned lands, Idaho Power analyzed the predominant use on the affected land parcels to determine whether the land should be considered Goal 3 farmland (agricultural use) or Goal 4 forestland. OAR 660-006-0050. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, pages 163, 238.)

4. The Umatilla County Development Code does not specify an approach for determining whether a particular parcel in the GF Zone is Goal 3 farmland or Goal 4 forestland. Umatilla County planning staff determined that the land within the project site boundary in the GF Zone in Umatilla County is forested Goal 4 land. Therefore, for purposes of its Application for Site Certificate (ASC) for the B2H Project, Idaho Power considered the portion of the GF Zone crossed by the project to be located entirely in Goal 4 forestland. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 163.)

5. In Union County, the Union County Zoning, Partition and Subdivision Ordinance (UCZPSO) requires land in the Timber-Grazing Zone land to be evaluated based on its

[5] The B2H Project Record was admitted into the contested case hearing record by order of the ALJ's *Response to ODOE's Inquiry Re: Marking and Submitting Exhibits,* issued May 26, 2021.

"predominant use" to determine whether it is Goal 3 farmland or Goal 4 forestland.[6] In Union County, Idaho Power worked with county planning staff to determine the predominant use of each of the 61 Union County parcels within the project site boundary located in the Timber-Grazing Zone.[7] (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 238; Scott Hartell Deposition at 67-69.)

6. To determine the predominant use on each Union County hybrid-zoned parcel, Idaho Power used data from the National Resources Conservation Service Soil Survey Geographic Database (SSURGO), Union County tax lot data, and GIS mapping software. Based on a table provided by Union County planning staff listing each SSURGO soil type[8] and the corresponding predominant use value for each soil type, Idaho Power assigned each parcel an initial predominant use value.[9] Idaho Power then had Union County review each parcel's initial predominant use value against 2011 aerial photography and tax lot records to adjust the predominant use to reflect current land use. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 239; see also Hartell Dep. at pages 9-13, 69-72.) Where available, soil data was the primary factor driving the predominant use analysis for affected parcels in the Union County Timber-Grazing zone. (Hartell Dep. at page 72-73.)

7. Union County's review of Idaho Power's predominant use analysis did not result in any adjustments to the predominant use value Idaho Power initially assigned to parcels in the Timber-Grazing Zone. For 18 of the 61 parcels in the Timber-Grazing Zone located near the

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[6] In this context, Union County defines "predominant use" as "the most common use of a parcel when differentiating between farmland and forest land." UCZPSO 1.08. The Union County Zoning Ordinance further states:

> In determining predominant use NRCS Soil Conservation Service soil maps will be used to determine soil designations and capabilities. The results of this process will be the most important method in determining the predominant use of the parcel. Other factors which may contribute to determining predominant use include parcel characteristics such as a commercial stand of timber, and the current use of the property. Removing a commercial stand of timber from a property will not result in a conversion of predominant use unless the property is disqualified as forest land by the Oregon Department of Forestry.

Id.

[7] Idaho Power submitted its preliminary ASC in February 2013. In classifying land in the Timber-Grazing Zone, Idaho Power relied on the Union County Comprehensive Plan and the UCZPSO in effect at that time. (Hartell Dep. at page 76-77.)

[8] The SSURGO database is maintained by the Natural Resources Conservation Service (NCRS). It contains information about soil types and is a compilation of NRCS soil survey data. Hartell Dep. at 69-70.

[9] Idaho Power assigned the following predominant use values: Crop High Value, Crop High Value if Irrigated, Crop, Range, Forest, Gravel Pit, Miscellaneous/Water or Urban/Not Rated. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 238.)

National Forest, there was no SSURGO data available. Therefore, for these 18 parcels, in the absence of soil data, Idaho Power conservatively determined that the land had a predominant use of forestland. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 239; Hartell Dep. At 72-73.)

8. Idaho Power's predominant use analysis for the 61 parcels crossed by the proposed project in Union County's Timber-Grazing Zone showed that the predominant uses within the site boundary are split between forest and range land, with a negligible amount of high value crop land. This information is set out in ASC Exhibit K, Table K-20 as follows:[10]

Table K-20. Timber-Grazing Zone Predominant Uses

Predominant Use	Number of Parcels[1]	Centerline (miles)	Site Boundary (acres)
Proposed Route			
Forest	33	15.2	1,063.7
Range	28	16.5	1,205.2
Crop High Value	1	–	0.1
Proposed Route – Total[2]	**62**	**31.7**	**2,269.0**
Morgan Lake Alternative			
Forest	20	7.0	525.2
Range	18	10.1	802.0
Crop High Value	–	–	–
Morgan Lake Alternative – Total[2]	**38**	**17.1**	**1,327.2**

[1] Number of parcels crossed by the site boundary.
[2] Sums may not total due to rounding.

(ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 239.)

9. In Union County, Idaho Power determined that for the Proposed Route, approximately 53 percent of Timber-Grazing zoned land has a predominant use of rangeland and about 47 percent had a predominant use of forestland. For the hybrid-zoned land along the Morgan Lake Alternative Route, Idaho Power determined that approximately 60 percent had a predominant use of rangeland and approximately 40 percent was forestland. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 239.)

10. ASC Exhibit K, Attachment K-2 (the Right-of-Way Clearing Assessment) states as follows:

> **7.0 COUNTY COSTS OF THE PROJECT WITHIN THE FORESTED LANDS ANALYSIS AREA**
>
> Forest lands in Umatilla County cover 715,000 acres (35%) of the 2,058,00[0] land base (Oregon Forest Resources Institute 2013). Conversion of 245.6 acres of forestland to agriculture or range, removes only 0.0034 percent of this land base, which will not be lost but will still be productive for agricultural and range use.

[10] The same information is set out in Table LU-5 in the Proposed Order (Union County Timber-Grazing Zone Predominant Uses). (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, pages 167-168.)

> The economic impact to forest sector jobs in Umatilla County is approximately $120,000, again partially offset by agriculture or rangeland uses after the conversion.
>
> Union County has 899,000 acres (69%) of forest land out of a total land area of 1,303,000 acres. Conversion of 530.1 acres to agriculture or range is a loss of 0.00059 percent of the forest land base, but again, the lands will still have value and be productive as agriculture or range lands. The economic impact to forest sector jobs in Union County is approximately $97,000, which will be partially offset by agriculture or range land uses after the conversion.

(ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 613; bold in original.)

11. Attachment K-2 to the Proposed Order, the July 2020 update to the Right-of-Way Clearing Assessment, contains the same information (including percentage of converted forest land) set out above. (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Page 9103 of 10016.)

12. Similarly, the Proposed Order states at page 250-251, as follows:

> *Economic Consequences*
>
> Under the Council's Land Use standard, in order for the Council to grant a Goal 4 exception, the Council must find that the applicant has demonstrated that economic consequences of the proposed facility have been identified and mitigated in accordance with Council standards. The applicant indicates that construction and operation of the transmission line would result in the conversion of approximately 245.6 acre of forestland in Umatilla County and approximately 530.1 acres of forestland in Union County. These losses correspond to approximately 0.0034 percent and 0.00059 percent of total forestland within the counties, respectively.

(ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02. Pages 257-58 of 10016.)

13. ASC Exhibit K, Attachment K-2 contains math errors in setting out the *percentage of losses to the forestland base* in Umatilla County and Union County. The percentage of land that would be converted from forestland to agricultural or range use in Umatilla County is actually .034 percent (not .0034 percent), and the percentage in Union County is actually .059 percent (not .00059 percent).

14. In ASC Exhibit K, Section 4, Idaho Power addressed ORS 215.283, ORS 215.275 and the requirements for siting a proposed facility in an exclusive farm use (EFU) zone.[11] As

[11] ORS 215.275(2) requires an applicant, as a threshold matter, to demonstrate that it considered reasonable alternatives to siting the facility within an EFU zone. After demonstrating that the applicant

required by ORS 215.275, Idaho Power included in ASC Exhibit K an analysis of reasonable alternatives to siting the facility in an EFU zone along with an analysis showing the need to site the proposed facility in an EFU zone due to the factors set out in ORS 215.275(2) (technical and engineering considerations; locational dependence; lack of available urban or non-resource lands; availability of existing right-of-ways; and public health and safety). (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, pages 28-42.)

15. As stated in ASC Exhibit K, based on discussions with the Department of Land Conservation and Development (DLCD), Idaho Power did not consider hybrid-zoned lands in its consideration of reasonable non-EFU alternatives. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 26.) However, in demonstrating the need to site the facility on EFU-zoned land due to the factors set out in ORS 215.275(2), Idaho Power included all EFU, range, and hybrid-zoned land (excluding forestland) in its analysis.[12] (*Id.* at pages 28-34, 63, 138, 213, 283, and 321.)

16. In the Proposed Order, the Department addressed land uses authorized in forest zones under OAR 660-006-0025(5). The Department noted that, in the ASC, Idaho Power analyzed potential impacts from proposed facility construction and operation on all Goal 3 (agriculture) and Goal 4 (forest) lands, including rangeland. As pertinent here, the Department found:

> Both local governing bodies within the forested portion of the proposed facility, Umatilla County and Union County, have established agriculture/forest zones. In Umatilla County, the zone is called the Grazing-Farm zone, and in Union County, the zone is called the Timber-Grazing zone. As explained further in Exhibit K (sections 6.5.2.2 and 6.6.2.3), for hybrid agricultural/forest zones, the applicant worked closely with the Umatilla County Planning Department and Union County Planning Department to determine the predominant use of the parcels in the applicable agriculture/forest zones and analyzed the potential impacts of the proposed facility.

(ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, pages 236-37.)

17. The Proposed Order describes Idaho Power's analysis in Umatilla County, noting that Idaho Power classified all hybrid-zoned land within the analysis area as forestland. The Proposed Order describes Idaho Power's predominant use analysis in Union County, noting that Idaho Power analyzed NRCS soil data, and to the extent the data was not available, made conservative assumptions that the land should be classified as forestland. (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, page 237.)

18. The Proposed Order found as follows:

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considered reasonable alternatives, ORS 215.275(2) requires the applicant to show that it must site the facility in an EFU zone due to one or more of six enumerated factors.

[12] For example, in its ORS 215.275(2) analysis for Union County, Idaho Power included EFU A-1, Agricultural Grazing A-2, and Timber-Grazing A-4 zoned land. (ODOE - B2HAPPDoc3-19 ASC 11_Exhibit K_Land Use_ASC 2018-09-28, page 213.)

> Based on the above-described approach, and record of consultation with Union and Umatilla Planning Departments to accurately identify and account for forest zoned lands within the analysis area, the Department recommends Council find that the methods are valid for assessing potential impacts to forest practices.

(ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, page 237.)

19. In the Proposed Order, the Department recommended Council find that the public interest in developing the transmission line would outweigh the state policy embedded in Goal 4 and that an exception to Goal 4 is warranted. The Department also recommended Council find that the proposed facility, including the proposed and alternative routes, complies with the identified applicable substantive criteria and the directly applicable state statutes and rules and, therefore, complies with the Council's Land Use standard, OAR 345-022-0030. (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, pages 253-260.)

CONCLUSIONS OF LAW

1. Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-2. Although Idaho Power erred in calculating the percentage loss to the forestland base in Umatilla and Union Counties, these math errors are not material to Idaho Power's Goal 4 analysis and the proposed project's compliance with the Land Use Standard.

2. Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-3. Idaho Power properly identified all forestland in the project area for purposes of its Goal 4 analysis and compliance with the Land Use Standard.

3. Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-5. Idaho Power properly used SSURGO soil classification data in determining the predominant use of hybrid-zoned land in Union County.

4. Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue LU-6. Idaho Power's analysis under ORS 215.275 of the need to site the facility on EFU-zoned land included all relevant farmland.

OPINION

1. *Standard of Review for Motion for Summary Determination*

As set out in the *Order on Case Management*, OAR 137-003-0580 sets out requirements and the standard for granting summary determination in contested case proceedings. The rule states, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:

> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
>
> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

In *Watts v. Board of Nursing*, 282 Or App 705 (2016), the Oregon Court of Appeals clarified the standard for granting motions for summary determination in administrative proceedings, stating:

> The board can grant a motion for summary determination only if the relevant documents, including affidavits, create "*no* genuine issue as to any material fact that is relevant to resolution of the legal issue." OAR 137-003-0580(6)(a) * * *. If there is evidence creating a relevant fact issue, then no matter how "overwhelming" the moving party's evidence may be, or how implausible the nonmoving party's version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing.

282 Or App 714; emphasis in original. *See also Wolff v. Board of Psychologist Examiners*, 284 Or App 792 (2017).

Similarly, in *King v. Department of Public Safety Standards and Training*, 289 Or App 314 (2017), the court stated:

> Issues may be resolved on a motion for summary determination only where the application of law to the facts requires a single, particular result. Therefore, the issues on summary determination must be purely legal.

289 Or App 321; internal citations omitted.

These cases make clear that summary determination may only be granted when there are no relevant facts in dispute and the question(s) to be resolved are purely legal.

2. *Applicable Law – the Land Use Standard, Statewide Planning Goals 3 and 4, local government comprehensive plans, and requirements for siting a facility in an EFU zone*

a. *The Land Use Standard*

As pertinent here, ORS 469.504, facility compliance with statewide planning goals, provides:

> (1) A proposed facility shall be found in compliance with the statewide planning goals under ORS 469.503 (4) if:
>
> * * * * *
>
> (b) The Energy Facility Siting Council determines that:
>
> (A) The facility complies with *applicable substantive criteria from the affected local government's acknowledged comprehensive plan and land use regulations that are required by the statewide planning goals* and in effect on the date the application is submitted, and with any Land Conservation and Development Commission administrative rules and goals and any land use statutes that apply directly to the facility under ORS 197.646;

(Emphasis added.)

OAR 345-022-0030, implementing the Land Use Standard, provides:

> (1) To issue a site certificate, *the Council must find that the proposed facility complies with the statewide planning goals adopted by the Land Conservation and Development Commission*.
>
> (2) The Council shall find that a proposed facility complies with section (1) if:
>
> * * * * *
>
> (b) The applicant elects to obtain a Council determination under ORS 469.504(1)(b) and the Council determines that:
>
> (A) The proposed facility complies with *applicable substantive criteria as described in section (3) and the facility complies with any Land Conservation and Development Commission administrative rules* and goals and any land use statutes directly applicable to the facility under ORS 197.646(3);[13]

(Emphasis added.)

///

[13] "Applicable substantive criteria" is defined in OAR 345-022-0030(3) as "criteria from the affected local government's acknowledged comprehensive plan and land use ordinances that are required by the statewide planning goals and that are in effect on the date the applicant submits the application."

b. Statewide Planning Goals 3 and 4, Agriculture Lands and Forest Lands:

Statewide Planning Goal 3: Agricultural Lands states:

> Agricultural lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space and with the state's agricultural land use policy expressed in ORS 215.243 and 215.700.

Statewide Planning Goal 4: **Forest Lands**[14] states:

> To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

OAR 660-015-0000(3) and (4).

The purpose of OAR Chapter 660, Division 6 is "to conserve forest lands as defined by Goal 4 and to define standards for compliance with implementing statutes at ORS 215.700 through 215.799." OAR 660-006-0000(1). The rules provide for "a balance between the application of Goal 3 'Agricultural Lands' and Goal 4 'Forest Lands' because the extent of lands that may be designated as either agricultural or forest land." OAR 660-006-0000(3).

ORS 660-006-0010 requires local governing bodies to identify "forest lands" and states as follows:

> (1) Governing bodies shall identify "forest lands" as defined by Goal 4 in the comprehensive plan. Lands inventoried as Goal 3 agricultural lands, lands for which an exception to Goal 4 is justified pursuant to ORS 197.732 and taken, and lands inside urban growth boundaries are not required to planned and zoned as forest lands.
>
> (2) Where a plan amendment is proposed:

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[14] For purposes of Goal 4, "Forest lands" is defined in OAR 660-006-0005(7) as follows:

> *[T] hose lands acknowledged as forest lands,* or, in the case of a plan amendment, forest lands shall include:
>
> (a) Lands that are suitable for commercial forest uses, including adjacent or nearby lands which are necessary to permit forest operations or practices; and
>
> (b) Other forested lands that maintain soil, air, water and fish and wildlife resources.

(Emphasis added.)

> (a) Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service. Where NRCS data are not available or are shown to be inaccurate, other site productivity data may be used to identify forest land, in the following order of priority: * * *
>
> (b) Where data of comparable quality under paragraphs (2)(a)(A) through (C) are not available or are shown to be inaccurate, an alternative method for determining productivity may be used as described in the Oregon Department of Forestry's Technical Bulletin entitled "Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010."
>
> (c) Counties shall identify forest lands that maintain soil air, water and fish and wildlife resources.

OAR 660-006-0025 lists the land uses authorized in Goal 4 Forest Lands. As pertinent here, "new electric transmission lines" may be authorized on forestlands,[15] subject to the following review standards:

> (a) The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands; [and]
>
> (b) The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel;

OAR 660-006-0025(5).

OAR 660-006-0050, addressing uses authorized in agriculture/forest zones, states as follows:

> (1) Governing bodies may establish agriculture/forest zones in accordance with Statewide Planning Goals 3 and 4, and OAR Chapter 660, divisions 6 and 33."

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[15] OAR 660-015-0025(4)(q) states:

> The following uses may be allowed on forest lands subject to the review standards in section (5) of this rule:
>
> * * * * *
>
> (q) New electric transmission lines with right of way widths of up to 100 feet as specified in ORS 772.210. New distribution lines (e.g., gas, oil, geothermal, telephone, fiber optic cable) with rights-of-way 50 feet or less in width[.]

ORS 772.210, in turn, authorizes a public utility to enter and condemn lands for construction of service facilities.

> (2) Uses authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-006-0025 and 660-006-0027, subject to the requirements of the applicable section, may be allowed in any agricultural/forest zone. The county shall apply either OAR chapter 660, division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993.
>
> (3) Dwellings and related structures authorized under section (2), where the predominant use is forestry, shall be subject to the requirements of OAR 660-006-0029 and 660-006-0035.

OAR 660-006-0029 sets out the siting standards for dwellings and structures in forest and hybrid agricultural/forest zones, and OAR 660-006-0035 sets out fire-siting standards for dwellings and structures in forest or hybrid agriculture/forest zone.

c. *Local government comprehensive plans and land use ordinances:*

The Umatilla County Development Code (UCDC) implements Umatilla County's Comprehensive Plan. UCDC Section 152.002. As pertinent here, UCDC section 152.080 states as follows:

> The GF, Grazing/Farm, Zone is designed to protect grazing lands, forest uses, and inclusions of agricultural land that are found within the county's mixed use farm/forest areas. The predominant use of the land is for grazing of livestock; however, there are some areas that are under agricultural cultivation and other areas where forest uses occur. The zone is also designed to conserve and protect watersheds, wildlife habitat and scenic values and views within the Blue Mountains. Certain land uses may be allowed conditionally. It is also the purpose of this zone to provide the automatic farm use valuation for farms and ranches which qualify under the provisions of ORS Chapter 308. Please see definition of farm use in § 152.003.

The Union County Zoning, Partition, and Subdivision Ordinance implements Union County's Comprehensive Plan. As noted previously, for purposes of the UCZPSO, the term "predominant use" is defined in UCZPSO 1.08. The term is used to describe the most common use of a parcel when differentiating between farmland and forestland.

UCZPSO Article 5 addresses Union County's hybrid "Timber-Grazing Zone (A-4)." Section 5.01 describes the purpose of the Timber-Grazing Zone as follows:

> [T]o protect and maintain forest lands for agriculture, grazing, and forest use, consistent with existing and future needs for agricultural and forest products. The A-4 Zone is also intended to allow other uses that are compatible with agricultural and forest activities, to protect scenic resources and fish and wildlife habitat, and to maintain and improve the quality of air, water and land resources of the county.

> The A-4 Zone has been applied to lands designated as Timber-Grazing in the Land Use Plan. The provisions of the A-4 Zone reflect the forest land policies of the Land Use Plan as well as the requirements of ORS Chapter 215 and OAR 660-006 and 660-033. The minimum parcel sizes and other standards established by this zone are intended to promote commercial, agricultural, and forest operations.

UCZPSO 5.02 addresses permitted uses in the Timber-Grazing A-4 zone. UCZPSO 5.04 sets out the authorized conditional uses in the Timber-Grazing A-4 zone and the general review criteria. UCZPSO 5.04 mirrors the language in OAR 660-006-0025(4)(q) by authorizing "new electric transmission lines" as a conditional use in the Timber-Grazing zone. UCZPSO 5.04.21. Similarly, UCZPSO 5.06 mirrors the language in OAR 660-006-0025(5) in setting out the conditional use review criteria:

> A use authorized by Section 5.04 of this zone may be allowed provided the following requirements or their equivalent are met. These requirements are designed to make the use compatible with forest operations and agriculture and to conserve values found on forest lands.
>
> 1. The proposed use will not force a significant change in, or significantly increase the cost of, accepted farming or forest practices on agriculture or forest lands.
>
> 2. The proposed use will not significantly increase fire hazard or significantly increase fire suppression costs or significantly increase risks to fire suppression personnel.

UCZPSO 5.06.

d. Siting a utility facility in an exclusive farm use zone:

ORS 215.275 provides, in pertinent part:

> (1) A utility facility established under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
>
> (2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) *must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone* due to one or more of the following factors:
>
> (a) Technical and engineering feasibility;
>
> (b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;

(c) Lack of available urban and nonresource lands;

(d) Availability of existing rights of way;

(e) Public health and safety; and

(f) Other requirements of state or federal agencies.

(Emphasis added.)

3. *Idaho Power's Motion Regarding Issue LU-2*

As set out above, Ms. Andrew was granted limited party status with standing on Issue LU-2: whether Applicant erred in calculating the percentage of forestland in Umatilla and Union Counties, thereby underestimating and misrepresenting the amount of potentially impacted forestland.

In her Petition for Party Status, Ms. Andrew asserted that Idaho Power miscalculated the percentage of forestland to be taken in Umatilla County and Union County, and that these math errors significantly underestimated the amount of potentially impacted forestland. Andrew Petition at 1.

In the motion, Idaho Power acknowledges the typographical/mathematical errors in the Right-of-Way Clearing Assessment, and concedes that the percentages of forestland to be converted should be stated as 0.059 percent in Union County and 0.034 percent in Umatilla County. Idaho Power also agrees that the related references to these percentages in the Proposed Order are incorrect, and should be correctly stated the Final Order. Nevertheless, Idaho Power contends that these typographical/mathematical errors set out in ASC Exhibit K and the Proposed Order have no bearing on Idaho Power's analysis of impacts to Goal 4 forest lands because the overall percentage of land to be converted from forest land to agricultural or range use is immaterial to the Goal 4 conditional use analysis and to the calculation estimating the economic impact of the proposed facility on accepted forest practices. Motion at 11-12.

In expressing its support for Idaho Power's motion regarding Issue LU-2, the Department states as follows:

> The Proposed Order provides the Department's evaluation of the applicant's assessment of potentially impacted forest lands in Union and Umatilla counties, in acres and value, and while not used to evaluate compliance with the applicable forest lands criteria, in response to DPO comments, the Department refers to the corrected calculated percentage that the acres represent when compared to overall forest lands in the state of Oregon. For these reasons, the Department supports applicant's Motion on Issue LU-2.

Department Response at 35-36.

Ms. Andrew did not submit any response or opposition to Idaho Power's Motion regarding LU-2.

Having reviewed the pertinent record, and considering the evidence in a light most favorable to Ms. Andrew, the non-moving party, the ALJ finds that although ASC Exhibit K, Attachment K-2 and Proposed Order, Attachment K-2 contain typographical/math errors that misstate the percentage of forest land to be converted to range or farm use in Union and Umatilla counties, these calculation errors are not material to the Goal 4 forestland analysis under the Land Use standard, OAR 345-022-0030.

As Idaho Power notes in its motion, there is nothing in OAR 345-022-0030 or the relevant provisions of ORS Chapter 660, Division 6 that require Idaho Power to identify the percentage of losses to the forestland base from the construction and operation of the proposed facility. Idaho Power offered the information in the Right-of-Way Clearing Assessment simply to provide context for the proposed facility's impacts to forestland. Nevertheless, the calculation errors (*i.e.*, 0.059 as opposed to 0.00059 and 0.034 as opposed to 0.0034) do not affect the bottom line. They are not a requirement of, or pertinent to, the Goal 4 compliance analysis under the Land Use standard.

Because the acknowledged math error in calculating the percentage of impacted forestland is not material to the Goal 4 analysis and the proposed project's compliance with the Land Use Standard, Idaho Power is entitled to a favorable ruling as a matter of law on Issue LU-2.[16]

4. *Idaho Power's Motion Regarding Issue LU-3*

Ms. Andrew also has limited party status on Issue LU-3, which states: whether Applicant's analysis of forestland impacts failed to consider all lands defined as Forest Land under state law, thereby misrepresenting forestland acreage.

In her Petition for Party Status, Ms. Andrew argued that Idaho Power failed to accurately represent all forestlands in the proposed project area as required by state law and that Idaho Power inappropriately "subtracted" acreage from the forestland calculation in Union County.[17] Andrew Petition at 2. Specifically, Ms. Andrew asserted that Idaho Power failed to consider the following factors[18] in identifying Union County forestland:

> 1) lands composed of existing and potential forest lands which are suitable for commercial forest uses; 2) other forested lands needed for watershed protection,

[16] The ALJ recommends, however, that these math errors be corrected in the Council's Final Order.

[17] Ms. Andrew's petition focuses on Idaho Power's determination of forestland acreage in Union County. She does not specifically contest Idaho Power's analysis of potential impacts to forestland in Umatilla County. Petition at 1-2.

[18] These same factors are set out in the definition of "forest lands" in UCZPO Section 1.08.

> wildlife and fisheries habitat and recreation; 3) lands where extreme conditions of climate, soil and topography require the maintenance of vegetative cover irrespective of use; 4) other forested lands in urban and agricultural areas which provide urban buffers, wind breaks, wildlife, and fisheries habitat, livestock habitat, scenic corridors and recreation use; 5) means any woodland, brushland, timberland, grazing land or clearing that, during any time of the year, contains enough forest growth, slashing or vegetation to constitute, in the judgment of the state forester, a fire hazard, regardless of how the land is zoned or taxed.

Id. She argued that "subtracting acreage from being counted as 'forest land' because of current use is not in compliance with statutes." *Id.*

In the Motion, Idaho Power argues that regardless of Ms. Andrew's factual allegations, it is entitled to a favorable ruling as a matter of law on Issue LU-3 because, as documented in ASC Exhibit K, Idaho Power appropriately identified all lands defined as forestlands in accordance with applicable state and local laws. Idaho Power notes that in Union County, it worked closely with county planning staff to analyze the predominant use on each of the 61 parcels within the site boundary located wholly or partially in the Timber-Grazing Zone. Idaho Power explained that, in accordance with UCZPSO requirements, it determined the predominant use of hybrid-zoned parcels by using soil maps and SSURGO data to determine soil designations and capabilities where such data was available. Where such data was not available to evaluate the predominant use, Idaho Power conservatively classified the land as forestland. Motion at 14-18.

In its response in support of Idaho Power's motion, the Department asserts that Idaho Power's methodology for identifying forestland within designated hybrid zones in Union county was conservative and consistent with OAR 660-006-0050(2) and the UCZSPO. Department Response at 36. In addition, the Department asserts that while the Proposed Order described Idaho Power's "assessment of potentially impacted forest land acres/value, forest land acres/value is not the basis of the [Goal 4] compliance evaluation – it is used for information purposes regarding scale of impact." *Id.* at 36-37. The Department adds that the "regulatory evaluation of compliance is based on whether applicant's proposed monitoring and minimization measures * * * would be sufficient to reduce potential impacts from the proposed facility to accepted forest practices and the cost thereof" under OAR 660-006-0025(5). *Id.* at 37. In other words, in supporting Idaho Power's motion on Issue LU-3, the Department contends that because the conditional use review criteria for forest zone land are not predicated on the amount of potentially impacted forest land acreage, whether Idaho Power understated the amount of forest land in Union County is immaterial.

In her Response opposing Idaho Power's motion regarding Issue LU-3,[19] Ms. Andrew argues that the identification of Goal 4 forest land in Union County must be done by assessing the cubic feet per acre per year of timber production capacity in the soils, and that soils with a rating of 20 or greater must be identified as forestland unless an evaluation of the parcel justifies

[19] Ms. Andrew's Response regarding Issue LU-3 is substantially similar to Ms. Gilbert's Response in opposition to Idaho Power's Motion regarding Issue LU-5, discussed *infra*. *See* Andrew Response at 1-8; Gilbert Response at 3-11.

excluding it from the forest land designation.[20] Andrew Response at 2, 7. She also contends that the UCZPSO process for identifying forestland is contrary to the requirements set out in OAR Chapter 660, division 6, and that Idaho Power erred in relying on the UCZPSO process because it resulted in understating the amount of Goal 4 forestland in Union County. In addition, she asserts that Union County failed to adopt amendments to its comprehensive plan to implement new requirements for Goal 4 compliance, rendering the UCZPSO invalid.[21] Andrew Response at 1-7.

In its Reply to Ms. Andrew's Response, Idaho Power asserts that Ms. Andrew raises issues and arguments in her response that are different from those she raised in commenting on the Draft Proposed Order (DPO) and in her petition for party status. Idaho Power notes that Ms. Andrew did not, in her DPO comments and petition for party status, specifically contest the UCZPSO and Union County's process for identifying forestland in hybrid farm-forest zones. Idaho Power argues that because Ms. Andrew did not contest Union County's Comprehensive Plan maps and the UCZPSO process (and the timber production capacity rating standard) in her DPO comments and petition for party status, she lacks standing to raise these arguments now in the context of Issue LU-3.[22]

The ALJ agrees with Idaho Power on this point. Ms. Andrew did not contest the validity of Union County's Comprehensive Plan maps, the UCZPSO definition of predominant use, or

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[20] She asserted:

> Union County failed to designate lands on the comprehensive plan map as forestlands consistent with Goal 4. The Union County policies referenced are not consistent with Division 6 due to a failure to determine cubic feet per acre per year for all soils in the Grazing/Forest zone to determine whether the land in specific parcels is Farm or Forest land. Union County did not identify resources which gave measurements for cubic feet per acre (cf/ac) per year of trees for land in the Grazing/Forest zone and appeared to utilize a standard of 63 cf/ac for determining soil in Goal 4 Forest land.

Andrew Response at 2.

[21] On this point, Ms. Andrew relies on ORS 197.646(1), which requires a local government to amend its comprehensive plan and land use regulations implementing the plan "to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals" and ORS 197.646(3) which states that when a local government does not amend its comprehensive plan and land use regulations as required by subsection (1), "the new requirements apply directly to the local government's land use decisions. The failure to adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335."

[22] *See* generally ORS 469.370(5)(b): "Issues that may be the basis for a contested case shall be limited to those raised on the record of the public hearing." See also OAR 345-015-0016(3): "If a person has not raised an issue at the public hearing with sufficient specificity to afford the decision maker an opportunity to respond to the issue, *the hearing officer may not consider the issue in the contested case proceeding*." (Emphasis added.)

the county's process for determining predominant use in her comments on the DPO. In contending that Idaho Power underestimated the amount of impacted forestland, Ms. Andrew did not assert that Union County's ordinance and process for determining predominant use is inconsistent with Goal 4. Therefore, she lacks standing to raise these arguments in objecting to Idaho Power's Motion regarding Issue LU-3. ORS 469.370(5)(b); OAR 345-015-0016(3).

As to Idaho Power's methodology for determining forest land acreage in affected parcels in the Timber-Grazing zone in Union County there are no material facts in dispute. For the reasons that follow, Idaho Power is entitled to a favorable ruling as a matter of law on Issue LU-3.

Idaho Power appropriately conducted the predominant use analysis on all Timber-Grazing zoned parcels within the project site boundary to determine the predominant use and proper designation in accordance with UCZPSO requirements. Where Idaho Power did not have soil data available to inform the determination on a particular parcel, it conservatively determined that the parcel should be classified as forestland. Union County reviewed Idaho Power's predominant use analysis and did not identify any concerns with the methodology or determinations.

Furthermore, even assuming (as Ms. Andrew asserted) that Idaho Power understated the amount of Goal 4 forest land in Union County potentially impacted by the proposed facility, the fact remains that the calculation of impacted forest land in Union County is not pertinent to the evaluation of whether the proposed facility complies with Goal 4. The relevant inquiry is whether the proposed facility (an authorized use under OAR 660-006-0025(4)(q)) satisfies the review standards set out in OAR 660-006-0025(5) (*i.e.*, whether the proposed use will force a significant change or significantly increase the cost of accepted farming or forest practices or significantly increase the risk of fire). The conditional use review criteria in Union County are the same as OAR 660-006-0025(5). Because any purported error related to identifying forestland would not substantively affect the analysis of whether the proposed transmission line satisfies the conditions to be sited in Goal 4 forestlands, Idaho Power is entitled to summary determination in its favor on Issue LU-3.

5. *Idaho Power's Motion Regarding Issue LU-5*

Ms. Gilbert has standing as a limited party on Contested Case Issue LU-5, which states: Whether calculation of forest lands must be based on soil class or whether it is sufficient to consider acreage where forest is predominant use.

In her Petition for Party Status regarding this issue, Ms. Gilbert asserted that Idaho Power failed to appropriately consider soil classification data in identifying forestland acreage for purposes of its Goal 4 compliance analysis and, as a result, significantly understated the proposed facility's impact on forestland in Union County.[23] Gilbert Petition at 6. Ms. Gilbert argued that Idaho Power erred in relying upon the UCZPSO and the predominant use analysis

[23] Like Ms. Andrew, Ms. Gilbert's challenge to Idaho Power's classification and analysis of potential impacts to forestland is limited to Union County parcels. *See* Gilbert Petition at 6.

because "Union County failed to update their rules to comply with state statutes." *Id.* Ms. Gilbert asserted that Union County erred the designation of forestland "as only including land currently growing trees."[24] *Id.* In addition, Ms. Gilbert asserted, "approximately 50% of the forested land [in Union County] was treated as agricultural land and permitted outright in error." *Id.* Ms. Gilbert maintained "Union County administrative rules cannot be substituted for statewide land use statutes and court decisions." *Id.*

In the Motion regarding Issue LU-5, Idaho Power argues that it considered relevant soil data in its predominant use determination and properly identified all forestland in Union County. Idaho Power also contends that, contrary to Ms. Gilbert's contention, neither Idaho Power nor Union County evaluated the hybrid-zoned parcels within the site boundary in Union County based on the current use of the land (*i.e.,* land currently growing trees). Idaho Power argues that, in accordance with UCZPSO 1.08, Idaho Power used soil maps and data from the NRCS SSURGO database to determine the predominant use of the land and make the forest vs. agricultural land designation where such soil data was available. Idaho Power further notes that where relevant soil data was not available, it made conservative assumptions and classified the parcels as forestland. Motion at 20-21.

Idaho Power responds to Ms. Gilbert's claim that it erred in treating approximately 50 percent of forested land in Union County as agricultural land by noting that the land in question is located in a hybrid farm-forest zone and that such a result is contemplated in OAR 660-006-0050(2) (in a hybrid zone, the county shall apply either the farm or forest standards based on the predominant use of the tract). Motion at 21. Finally, Idaho Power asserts that even if Ms. Gilbert could show some error in Idaho Power's predominant use analysis in Union County, she has not shown that such error would change the outcome Idaho Power's Goal 4 compliance analysis and the determination that the proposed project complies with the Land Use standard. *Id.* at 22.

In its Response to Idaho Power's Motion regarding Issue LU-5, the Department asserts that Idaho Power's legal arguments are consistent with the Proposed Order. Department Response at 38. The Department also notes, as it did in its Response regarding Issue LU-3, that "[w]hile the Proposed Order describes the applicant's assessment of potentially impacted forest land acres/value, forest land acres/value is not the basis of the compliance evaluation, it is used for information purposes regarding the scale of impact. The regulatory evaluation of compliance is based on whether applicant's proposed monitoring and minimization measures * * * would be

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[24] In her Petition, Ms. Gilbert alleged:

> The county planner's error in the designation of forest land as only including land currently growing trees cannot be used due to ORS 197.250 which states * * *. Union County failed to update their administrative rules to comply with state statutes which must be applied, however, that does not exempt the county from complying with the state standard.

Gilbert Petition at 6.

sufficient to reduce potential impacts from the proposed facility to accepted forest practices and the cost thereof under OAR 660-006-0025(5)."[25] *Id.*

In her Response regarding Issue LU-5, Ms. Gilbert asserts, "Union County failed to designate lands on the comprehensive plan map as a forest lands consistent with Goal 4." Gilbert Response at 3. She argues that the UCZPSO is "not consistent with Division 6 due to a failure to determine cubic feet per acre per year for all soils in the Grazing/Forest zone to determine whether the land in specific parcels is farm or forest land." *Id.* Ms. Gilbert further contends that Union County "failed to comply with the statutes or rules regarding the determination of forest land when they used a solid capacity rating of 63 or greater cubic feet per acre as the standard for determining soil is Goal 4 Forest Land." *Id.*

In making these arguments in opposition to the Motion, Ms. Gilbert relies, in part, on the deposition of Scott Hartell, Union County Planning Director.[26] She contends that Union County used an outdated soil chart[27] to determine soil capacity and identify Goal 4 forestland. She further contends that Union County should have identified forestland using the soil capacity rating analysis referenced in OAR 660-006-0010(2)[28] instead of the predominant use analysis set out in the UCZPSO. Gilbert Response at 5. She concludes:

> The identification of land in Union County that must be treated as Goal 4 timber land in the combined agricultural/forest zone, must be determined through identification of the cubic feet per acre per year of timber production capacity of the soils. Soils with a rating of 20 or greater must be identified as "forest land" unless an evaluation of the parcel justifies excluding it from this designation. Reliance on the County Planner recommendations from County Ordinances that have not been updated to reflect the 2008 and 2011 changes in statute cannot overrule the requirements of the statutes or rules.

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[25] As set out previously, OAR 660-006-0025(5) sets out the review standards for land uses authorized in Goal 4 forestlands under OAR 660-006-0024(4), including new electric transmission lines.

[26] Ms. Gilbert submitted a certified transcript of the Hartell deposition with her Response in opposition to Idaho Power's Motion regarding issue LU-5.

[27] A "Pilot Program Soil Ratings for Union County" chart is referenced as Exhibit 1 in the Hartell deposition, but the chart/exhibit is not attached to the deposition transcript and is not included with Ms. Gilbert's Response.

[28] As set out previously, OAR 660-006-0010(2) states, in pertinent part:

> (2) *Where a plan amendment is proposed*:
>
> (a) Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service.

(Emphasis added.)

Id. at 11.

In its Reply, Idaho Power contends that to the extent Ms. Gilbert argues in her Response that Union County incorrectly identified soil classes in its comprehensive plan mapping and erred in applying a soil capacity rating of 63 cubic feet per acre per year (cf/ac/yr) to determine the predominant use of hybrid-zone parcels potentially impacted by the proposed facility, she is raising a new and different claim from those stated in her DPO comments and petition for party status. Idaho Power argues that because Ms. Gilbert did not raise this specific challenge to Union County's methodology in her DPO comments, this challenge may not be considered in the contested case. Reply at 19.

Idaho Power further asserts that there are no material facts in dispute with regard to Idaho Power's calculation of forest land in Union County and that, even if Ms. Gilbert is not precluded from raising this new challenge to in response to Idaho Power's Motion regarding Issue LU-5, she has not cited any applicable statute or rule to support her contention that statewide planning rules require that all lands consisting of soils capable of producing at least 20 cf/ac/yr be identified as forest lands. Reply at 20. Idaho Power also notes that Ms. Gilbert did not state with any specificity how the UCZPSO is inconsistent with any land use statue or administrative rule. *Id.*

Idaho Power's contentions have merit. First, although Ms. Gilbert asserted in her petition for party status that Union County failed to update its ordinance to comply with state law, she has not offered any cogent explanation as to how or why the Union County Comprehensive Plan and the UCZPSO are non-compliant with Goal 4. Second, Ms. Gilbert did not claim in her petition that Union County applied an incorrect cubic foot per acre per year standard and/or that Union County incorrectly identified soil classes in its comprehensive plan mapping. Instead, she asserted that Union County erred by "only including land currently growing trees." Gilbert Petition at 6. Because Ms. Gilbert did not raise these challenges to Union County's mapping and the UCZPSO on the record of the DPO and in her petition for party status, they may not be considered in the contested case. ORS 469.370(5)(b); OAR 345-015-0016(3).

Furthermore, even if Ms. Gilbert was not precluded from raising these contentions, she has not cited to any applicable statute or administrative rule requiring that Union County (and/or Idaho Power) use a soil capacity standard of 20 cf/ac/yr when determining predominant use and differentiating between farmland and forestland.[29] She has not identified a relevant factual dispute with regard to Union County's and/or Idaho Power's methodology for identifying Goal 4 forestland in the project area. Indeed, Mr. Hartell's deposition confirms that Idaho Power

[29] To the extent Ms. Gilbert relies on OAR 660-006-0010(2) for the process of identifying Goal 4 forestland, that provision is not applicable in this context. The process for identifying "lands suitable for commercial uses" in OAR 660-006-0010(2) only applies "where a plan amendment is proposed." Here, there is no indication that Union County has proposed any amendment to its comprehensive plan. To the extent Ms. Gilbert relies on OAR 660-033-0130(4)(c)(B)(iii) for the 20 cf/ac/yr standard, that provision is also not applicable here. OAR 660-033-0130 pertains to agricultural land and the minimum standards applicable to permitted and conditional uses on farmland. In addition, to the extent Ms. Gilbert relies on Land Use Board of Appeals (LUBA) opinions, those opinions do not govern and do not support her position.

worked with Union County planning staff to determine the predominant use of each of the 61 parcels located in the Timber-Grazing Zone and used SSURGO soil data, Union County tax lot data, and GIS mapping software to do so. Mr. Hartell's deposition also confirms that Union County reviewed Idaho Power's analysis and determination of forestland acreage in the project area and "came up with the same conclusions." Hartell Depo. at 6.

It is immaterial that Union County and Idaho Power did not establish the cubic foot per acre per year for every affected hybrid-zoned parcel in the county and did not apply 20 cf/ac/yr threshold in its predominant use analysis because there is no requirement to do so for purposes of establishing the proposed facility's compliance with Goal 4 and the Land Use Standard. Additionally, as discussed previously, even if Idaho Power erred in its determination of impacted forestland acreage in Union County, the amount of impacted forestland acreage is not material to the Goal 4 compliance analysis. The Land Use standard compliance analysis focuses on approval under the applicable substantive criteria (i.e., the UCZPSO) and OAR 660-006-0025, neither of which are dependent upon the amount of acreage impacted.

In summary, Ms. Gilbert has not provided any evidence to support her contention that Idaho Power failed to consider soil class when identifying forestlands in Union County, and the evidence in the record establishes otherwise. In accordance with the UCZPSO, Idaho Power used SSURGO soil data as the primary tool for identifying forestlands in Union County. Ms. Gilbert has not raised a genuine issue of fact in this regard. Consequently, as a matter of law, Idaho Power is entitled to summary determination in its favor on Issue LU-5.

6. *Idaho Power's Motion Regarding Issue LU-6*

Ms. Gilbert also has standing as a limited party on Contested Case Issue LU-6, which states: Whether the alternatives analysis under ORS 215.275 included all relevant farmland.

In her petition for party status, Ms. Gilbert asserted that Idaho Power failed to include all farmland in its analysis under ORS 215.275.[30] She asserted that the evaluation of impacts to farmland "needs to include all farmland, not just high value farmland." Gilbert Petition at 14. She also argued that Idaho Power "did not include land zoned rangeland/farmland in this review and it appears they limited it to only high value farmland." *Id.* In her comments on the DPO, Ms. Gilbert similarly asserted that Idaho Power "failed to include lands zoned as a combination of rangeland and farm use as farm land subject to the provisions of ORS 215.275. ODOE - B2HAPPDoc5-1 All DPO Comments Combined-Rec'd 2019-05-22 to 08-22, page 1608.

In its Motion regarding Issue LU-6, Idaho Power argues that it is entitled to summary determination in its favor because it did, in fact, include rangeland in its ORS 215.275 analysis, and Ms. Gilbert has presented no evidence to the contrary. Idaho Power explains Ms. Gilbert's contention that Idaho Power did not include land zoned rangeland/farmland in its review is based on a misunderstanding of Idaho Power's EFU analysis in ASC Exhibit K. Idaho Power notes that it took a conservative approach, as recommended by DLCD staff, and did not include hybrid-zoned land with a predominant use of rangeland in the first step of its analysis (evaluating

[30] As set out previously, ORS 215.275 address the standard for siting an energy facility in an exclusive farm use zone.

non-EFU alternatives), but in the second step of its analysis (assessing the necessity for siting the facility in a EFU zone due under the factors set out in ORS 215.275(2)) it included all EFU land, rangeland, and hybrid-zoned land (except forest land).[31] Motion at 23-25.

In its Response regarding Issue LU-6, the Department states its support for Idaho Power's Motion, noting that: (1) the ORS 215.275 compliance evaluation includes all relevant farmland; and (2) Ms. Gilbert bases her assertions to the contrary on a misunderstanding of Idaho Power's two-pronged EFU siting analysis. Department Response at 38-39.

Ms. Gilbert did not file a response to Idaho Power's Motion regarding Issue LU-6.

In short, for the reasons stated in the Motion, Idaho Power is entitled to summary determination in its favor on Issue LU-6. There are no material facts in dispute with regard to this issue. Idaho Power appropriately excluded range land when considering reasonable non-EFU alternatives and appropriately included all relevant farmland (all EFU, range, and hybrid-zoned land except forest land) when evaluating the need for siting the facility in EFU lands pursuant to ORS 215.275(2).

ORDER

Idaho Power Company's Motion for Summary Determination on Contested Case Issues LU-2 and LU-3 is GRANTED.

Idaho Power Company's Motion for Summary Determination on Contested Case Issues LU-5 and LU-6 is also GRANTED.

Issues LU-2, LU-3, LU-5 and LU-6 are dismissed from the contested case.

Alison Greene Webster
Senior Administrative Law Judge
Office of Administrative Hearings

NOTICE OF RIGHT TO INTERLOCUTORY APPEAL PURSUANT TO OAR 345-015-0057

If this ruling terminates the limited party's right to participate in the contested case

[31] Idaho Power explained that by excluding hybrid zoned land with a predominant use of range land from the first step of the analysis "meant that Idaho Power as considering it as *an alternative* to site on EFU. On the other hand, if Idaho Power would have included all hybrid land in the first step of the analysis, it would have meant that there would have been less land available as an alternative to site in EFU, further demonstrating the need to site the project in EFU." Motion at 25. Idaho Power added that even if it had included hybrid land in its alternatives analysis, its determination would have not changed because "there are no non-EFU alternatives in Oregon that could connect the project from the Hemingway Station to the termination point in Boardman, and accordingly the project must be sited on EFU land." *Id.*

proceeding, the limited party may take an interlocutory appeal to the Council pursuant to OAR 345-015-0057(1).

Pursuant to OAR 345-015-0057(2), the limited party shall submit an appeal involving the limited party's right to participate in this contested case proceeding, with supporting arguments and documents, to the Council within seven (7) calendar days after the date of service of this ruling.

CERTIFICATE OF MAILING

On July 21, 2021, I mailed the foregoing RULING AND ORDER ON MOTION FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUES LU-2, LU-3, LU-5 AND LU-6 issued on this date in OAH Case No. 2019-ABC-02833**.**

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BEFORE THE OFFICE OF ADMINISTRATIVE HEARING
STATE OF OREGON
for the
OREGON DEPARTMENT OF ENERGY

OAH CASE No. 2019-ABC-02833

Alison Greene Webster
Senior Administrative Law Judge
Office of Administrative Hearings

RESPONSE OBJECTING TO IDAHO POWER'S MOTION FOR SUMMARY DETERMINATION REGARDING CONTESTED CASE ISSUE LU-5

There are disputes of fact and law in this case that preclude the ALJ from granting Idaho Power's request for Summary Determination in this issue.

Under OAR 137-0093-0580, summary determination is appropriate only if the evidence, when viewed in the light most favorable to the nonmoving party, establishes that "there is 'no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought, and the nonparty filing the motion is entitled to a favorable ruling as a matter of law."
The scope of the interpretation of the rules cannot be in interpreted so broadly that it includes factual disputes when they exist.

LU-5 issue statement:
"Whether calculation of forest lands must be based on soil class or whether it is sufficient to consider acreage where forest is predominant use."

Complete statement of contested case request:

"I am requesting a contested case due the failure of the applicant to comply with the state Land Use Goal 4 rules regarding the identification of forest land for establishing compliance with the standards which resulted in understating the impacts of this development on forest land and failing to address the forested area as a conditional use. I commented on this issue

on Page 1608 and 161 of the compiled public comments done by the Oregon Department of Energy

The applicant relied upon Union County Administrative Rules UCZPSO as stated on Page 148 of the Draft Proposed Order. This resulted in the incorrect identification of forest land relying upon the predominant use rather than the soil class to identify forest land in Union County. The means there is a significantly understating the amount, value and impacts of the damages to forest lands in the county.

Approximately 50% of the forested land was treated as agricultural land, and permitted outright in error as opposed to being treated as a conditional use which would be difficult to justify given the amount of land involved.

The Proposed Order fails to comply with ORS 469.504 requiring compliance with statewide land use goals, ORS 527.722 which restricts local government adoption of rules regulating forest operations. This statute states local governments cannot "adopt any rules, regulations or ordinances or take any other actions that prohibit, limit, regulate, subject to approval or in any other way affect forest practices on forestlands located outside of the acknowledged urban growth boundary. The county planner's error in the designation of forest land as only including land currently growing trees cannot be used due to ORS 197.250 which states: " all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special district shall be in compliance with the goals within one year after the date those goals are approved by the Land Conservation and Development Commission. Union County failed to update their administrative rules to comply with state statutes which must be applied, however, that does not exempt the county from complying with the state standard.

The actions also conflict with the following administrative rules:

OAR 345-021-0010(1)(k) due to a failure to apply the requirements for identifying forest lands consistent with state statutes and OAR 345-022-0030 due to the fact that the council lacks information necessary to assess whether or not the development can be found in compliance with Goal 4 due to the error in identifying impacts of removal of forest lands.

Union County administrative rules cannot be substituted for statewide land use statutes and court decisions."

ISSUE STATEMENT:

There are factual and legal issues regarding the correct interpretation and application of the Rules and Statutes relating to the issue of determining the areas meeting the definition of Goal 4 land. I will be documenting the following:

Union County failed to designate lands on the comprehensive plan map as forest lands consistent with Goal 4. The Union County policies referenced are not consistent with Division 6 due to a failure to determine cubic feet per acre per year for all soils in the Grazing/Forest zone to determine whether the land in specific parcels is Farm or Forest land. The county failed to comply with the statutes and rules regarding the determination of forest land when they used a soil capacity rating of 63 or greater cubic feet per acre per year as the standard for determining soil is Goal 4 Forest land.

ARGUMENTS OBJECTING TO THE MOTION FOR SUMMARY DETERMINATION REGARDING THE ABOVE DESCRIBED CONTESTED CASE:

Please incorporate the language included in my accepted Contested Case above as a part of the argument against allowing a Summary Determination denying the contested case regarding Issue LU-5

Mr. Scott Hartell, Union County Planning Director was deposed on June 4, 2021. In his deposition he confirmed that the soil capacity he used to have the decision made regarding the soils in Union County to be counted as Forest Land was 63 cubic feet per acre per year or greater. In the certified copy of the deposition beginning on page 82 confirms this. It states:

"Q. And, once again, just to confirm, you are not aware of what the –the standard is for cubic feet per acre per year for forest land in Eastern Oregon, that there is a standard.

So I'm—I guess I'm –I'm still confused about why you made the determination that –that 63 cubic feet per acre per year identified forest

land per the soils classification because those are the only ones on your you're your sheet.

There's nothing with less than that (indiscernible) cubic feet per acre capacity of the soil. Where did that come from? Where – where was that decision made, I guess, or how did you make the decision when it was made?

A If you're referencing the –what is it –Exhibit –

Q Exhibit 1.

A -- l, soils chart determination, you'll see the date on that is 1993.

Q Uh-huh

A As Mr. Rowe asked me when I became employed with Union County, it was 1995.

Q Uh-huh

A So I have not gone back and looked at the soil study, nor the – the BLCD involvement in that soil study. So I can't answer those questions for you.

Q Yeah, and –yeah. Right. I can accept that.

Okay. I'm just –I'm just basically confused about –about what kind of cubic feet per acre per year of capacity of these soils that you're calling range or agricultural since it's not on this chart.

And, apparently, there – you're not aware of there having been any evaluation of that to determine if any – any of these things that are being called agricultural or range land actually have a – a capacity that would qualify them as forest land.

A Since I wasn't here in 1993, I cannot speak intelligently –"

Q Okay.

A -- to that document and how it was developed and reviewed by the state and accepted by the State is a part of what we implement in Union County.

Q Okay

A I can tell you it is a part of the acknowledgement from the State that Union County is in compliance with operating the statewide planning program.

Q. Okay. But there were no updates made since then. There are no –this—this chart has been just the way it is now since 1993 and you

did not do any current evaluation of soil capacity in these combined zones?

A No"

The following facts are documented through the above language in Mr. Hartell's deposition:

1.The Union County Planner used the four page Chart provided as Exhibit 1 from his deposition entitled, "Pilot Program Soil Ratings for Union County, March 16, 1993 as the basis for determining the soil capacity of soils in Union County.

2. The 1993 chart has not been updated since Mr. Hartell went to work for the Union County Planning Department in 1993,

1. The policies in the Union County UCZPO fail to comply with the Definitions included in OAR 660-006-0005 because the policies do not include *"all lands suitable for commercial forest uses, including adjacent or nearby lands which are necessary to permit forest operations and other forested lands that maintain soil, air, water and fish and wildlife resources."* And they fail to require the identification of capacity to produce commercial tree species of all soils in the grazing/timber zone. *(1)*

OAR 660-006-0010(2) describes how forest land is to be identified. It states that *"Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation Service."* (l) and directs counties to *"identify lands that maintain soil air, water and fish and wildlife resources."*

2. Including forest land under a grazing/timber **designation does not allow for treating the land less restrictively** than the Goal 4 rules require with the exception of "dwellings".

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(1) Irene Gilbert MSD Issue LU-5 Potts v Clackamas County , LUBA No. 2001-201

3. OAR 660-006-0015 states, *"In areas of intermingled agricultural and forest lands, an agricultural/forest lands designation may also be* ***appropriate if it provides protection for forest lands consistent with the requirements of OAR chapter 660, Division 6.****"*

Uses allowed outright on Agricultural lands listed in OAR 660-006-0015(4) cannot be allowed in Goal 4 lands within an area containing both Agricultural and Forest lands as this is less restrictive than the Goal 4 requirements. They must be evaluated under the requirements of OAR 660-006-0015(5) as a conditional use.

4. OAR 660-006-0050(2) referenced by the petitioner relates only to the approval of a dwelling, not building a transmission line as noted below in the plain language of the administrative rule stated below.

"660-006-0050
Uses Authorized in Agriculture/Forest Zones

(1) Governing bodies may establish agriculture/forest zones in accordance with both Goals 3 and 4, and OAR chapter 660, divisions 6 and 33.

(2) Uses authorized in Exclusive Farm Use Zones in ORS Chapter 215, and in OAR 660-006-0025 and 660-006-0027, ***subject to the requirements of the applicable section****, may be allowed in any agricultural/forest zone. The county* ***shall apply either OAR chapter 660, division 6 or 33 standards for siting a dwelling in an agriculture/forest zone based on the predominant use of the tract on January 1, 1993.***

(3) Dwellings and related structures authorized under section (2), where the predominant use is forestry shall be subject to the requirements of OAR 660-006-0029 and 660-006-0035."

4. The courts have confirmed that a counties comprehensive plan acknowledged prior to the 2008 and 2011 amendments to Goal 4 does not exempt the county from requirements under ORS 197.646(1) and (3) to apply the amendments to Goal 4 or the Goal 4 rule until the county updates its comprehensive plan. This ruling also affirmed that counties cannot use

their comprehensive plan standards, but must also apply the requirements from the amended Goal 4 rule. (2)

In the proposed order, on Page 155 of Section 4 the footnote states that Idaho Power indicated that they relied upon the Union County Planning Director's direction taken from the local Ordinance in determining what areas were Forest Land. The local Planning Director, Scott Hartell, confirmed in his deposition on June 4, 2021, that he relied entirely upon the Union County Zoning, Partition, and Subdivision Ordinance (UCZPSO) in providing information regarding what constituted "Forest Land". He also stated during that deposition that he relied upon and provided the document entitled "Pilot Program Soil Ratings for Union County, March 16, 1993",(Exhibit 1 from the deposition), and no other document to identify cubic feet per acre per year of timber production to identify forest land under the soil capacity requirement, This was the method relied upon to determine what land in the "Grazing/Timber zone should be identified as "Forest Land" and treated as Goal 4 land based upon soil capacity. Mr. Hartell also stated n Page 56 of his deposition that he never indicated to Idaho Power a standard for what designation of cubic feet per acre per year should be used to identify forest land in Union County. This document only provides cubic feet per acre per year of timber production capacity for soils that are rated to be able to produce 63 cubic feet per acre per year and greater. Mr. Hartell stated that he did not determine or provide the soil rating for the soils in the table that do not contain a Cubic Feet amount in the final column on page 22 of his deposition he states in response to my question regarding whether or not he figured out what the cubic feet per acre production for all of the soils on the chart, he stated "No, I did not". In other words, no soils with a cubic foot per acre timber production capacity between 20 and 63 were considered to be "Forest Land" under Goal 4. This fails to comply with the statute, the OAR 660-006 rules and the appeals court decisions regarding the fact that a counties rules do not override the statute in identifying land that is considered "forest land".(5)

A review of the information included in the Soil Ratings Document shows multiple errors and discrepancies between this 1993 document and the statutes enacted in 2008 and 2011.

Some of the areas where the error are obvious include: 1. It only identifies 16 soil types that are identified as "Forest Land" and they include none with a cubic foot capacity per acre per year rating less than 63; 2. It identifies 65 soil types as being "crop" or "range". Of these 65 soil types the chart

classifies Anatone-Kicker Complex soil with a cubic foot rating of 63 as "range"; Cowsley Silt Loam with a cubic foot rating of 99 as "crop"; North Powder Loam with a cubic foot rating of 102 as "Range"; and Wolot Silt Loam with a cubic foot rating of 112 as "crop"; 3. There are 66 soil types with no cubic foot rating that are designated as "crop" or "range" and which are being treated as "agricultural" land in the Grazing/Timber zone.

The Union County UCZPSO was developed in 1995 and was not updated until 2015. The 1995 ordinance did not include bringing the local code into compliance with the statute regarding the identification of "Forest Land". as it was developed prior to their enactment. I requested and Mr. Hartell agreed during his deposition to provide me with the amendment date and language updated during 2015, however, he has failed to provide this documentation. (6)

As an alternative, I submit this objection to the summary determination request as documentation that the current Union County Zoning, Partitioning, and Subdividing Ordinance rules fail to comply with the statutes and rules regarding the determination of what constitutes Forest Land. This documents multiple areas where the (UCZPSO) fails to comply with OAR 666-006-005(7) which requires that the plan amendment include *"lands that are suitable for commercial forest uses, including adjacent or nearby lands which are necessary to permit forest operations or practices, and other forested lands that maintain soil, air, water and fish and wildlife resources*"

and OAR 550-0906-0010 requiring the plans to *include "Lands suitable for commercial forest uses shall be identified using a mapping of average annual wood production capability by cubic foot per acre (cf/ac) as reported by the USDA Natural Resources Conservation* Service. *Where NRCS data are not available or are shown to be inaccurate, other site productivity data may be used to identify forest land, in the following order of priority:*

**(2) Irene Gilert MSD Issue M-l Exhibit 2 Rogue Advocates v. Josephine County, 66 Or LUBA (2012).A post-acknowledgement plan amendment that adopts a policy for protecting forest land that defines forest lands to exclude certain lands that fall within the statewide planning goal definition of "forest lands" must be remanded

(4) Irene Gilbert MSD, Issue M-5, Exhibit 4

(5) Irene Gilbert MSD, Issue M-5, Exhibit 5 Wetherall v. Douglas County, 62 Or LUBA 80 (2010)

(A) Oregon Department of Revenue western Oregon site class maps;

(B) USDA Forest Service plant association guides; or

(C) Other information determined by the State Forester to be of comparable quality.

(b) Where data of comparable quality under paragraphs (2)(a)(A) through (C) are not available or are shown to be inaccurate, an alternative method for determining productivity may be used as described in the Oregon Department of Forestry's Technical Bulletin entitled "Land Use Planning Notes, Number 3 April 1998, Updated for Clarity April 2010."

(c) Counties shall identify forest lands that maintain soil air, water and fish and wildlife resources."

The Union County Ordinance also fails to comply with ORS 197.646 which provides,:
"(1) A local government shall amend its acknowledged comprehensive plan acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.
" * * * *

"(3) When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government's land use decisions".

Defining Forest Land by excluding soils with less than 63 cubic feet per acre per year of timber production capability fails to comply with the LCDC interpretation and description of Forest Land as well as court decisions that reflect the need to identify land with soil production capacity down to 20 cubic feet per acre per year as Forest Land unless it can be documented that

there are other factors, not just a failure of the landowner to be currently using the land to produce timber.(7)

Decisions regarding what areas are Goal 4 lands cannot be based upon a county determination regarding the threshold of cubic feet per acre per year of timber production capacity that is greater than that established by rule and law.

In Wetherell v. Douglas County it was decided that a forestry consultant conclusion that land is not forest land subject to Goal 4 where it is based on an erroneous assumption that the county's comprehensive plan provides a productivity threshold of 80 cubic feet per acre per year and that when soil has the potential to produce between 47 and 76 cubic feet per acre per year in wood fiber, the property has moderately productive soils that preclude a finding that the property is not suitable for commercial forestry, unless the county identifies additional factors other than soils that render the property unsuitable for commercial forest use.(7)

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(7) Irene Gilbert, MSD, Issue M-5, Exhibit 7 Wetherall v. Douglas County, 62 Or LUBA 80 (2010) Pages 9-13

Some of the errors that have resulted from failing to identify all the "forest land" in Union County in evaluation of EFSC standards include but are not limited to:

1. The amount of forest land is significantly under stated and the impacts of removal of that land upon the local economy, wildlife, recreation, and other resources has not been determined.
2. The resources impacted by the removal of forest land for over 100 years and the value of those resources to Union County have not been identified so it cannot be established that a conditional use permit can be allowed.
3. The evaluation of the increased risk of fire to forest land must include identification of the land that is subject to the transmission line and the mitigation necessary to protect that land from the increased risk.

Regarding the need to identify soil capacity in terms of cubic feet per acre per year of timber, the following rule supports this:

> OAR 660-0033-0130(4)(c)(B)(iii) states, "If a lot or parcel is under forest assessment, the area is not "generally unsuitable" simply because it is too small to be managed for forest production profitably by itself. If a lot or parcel under forest assessment can be sold, leased, rented or otherwise managed as a part of a forestry operation, it is not "generally unsuitable". If a lot or parcel is under forest assessment, it is presumed suitable if, in Western Oregon, it is composed predominantly of soils capable of producing 50 cubic feet of wood fiber per acre per year, or in Eastern Oregon it is composed predominantly of soils capable of producing 20 cubic feet of wood fiber per acre per year. If a lot or parcel is under forest assessment, to be found compatible and not seriously interfere with forest uses on surrounding land it must not force a significant change in forest practices or significantly increase the cost of those practices on the surrounding land"

CONCLUSION:

The identification of land in Union County that must be treated as Goal 4 timber land in the combined agricultural/forest zone, must be determined through identification of the cubic feet per acre per year of timber production capacity of the soils. Soils with a rating of 20 or greater must be identified as "forest land" unless an evaluation of the parcel justifies excluding it from this designation. Reliance on the County Planner recommendations from County Ordinances that have not been updated to reflect the 2008 and 2011 changes in statute cannot overrule the requirements of the statutes or rules.

The application and Proposed Order fail to comply with the statutes regarding Forest land and EFSC cannot waive the statutes in making decisions regarding what constitutes Goal 4 land and whether that land qualifies as a conditional use or can be exempted from complying with the statutes.

Appeal decisions supporting this conclusion include the following two orders included as additional exhibits.

--Cattoche v. Lane County, 79 Or LUBA 466 (2019).
While the mere presence of trees on property is not itself sufficient to establish that the property constitutes “other forested lands that maintain soil, air, water and fish and wildlife resources” under Goal 4, a county errs by concluding that property does not so qualify merely because it is not “predominately forested.”

.

‘

‘

CERTIFICATE OF MAILING

On June 25, 2021, I mailed the foregoing RESPONSE TO NOTICE OF SUMMARY DETERMINATION issued on this date in OAH Case No. 2019-ABC-02833**.**

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Irene Gilbert, Petitioner

Pilot Program Soil Ratings for Union County

March 16, 1993

T: Grande Ronde Terrace

M: Mountain

B: Bottom

CFT: Cricket Flat Terrace

NPT: North Powder Terrace

F: Foothill

Symbol	Map Unit Name	Crop	Forest	Range	Land	AC/ AUM	Cubic Feet
1B	Alicel Fine Sandy Loam	X			T		
2B	Alicel Loam	X			T		
3C	Alicel Silt Loam	X			T		
4E	Anatone Extremely Stony Loam			X	M	3.0	
5E	Anatone-Rocker Complex			X	M	4.2	
6F	Anatone-Klicker Complex			X	M	4.4	63
7	Catherine Silt Loam	X			B/T		
8	Catherine Silty Clay Loam	X			B/T		
9A	Conley Silty Clay Loam	X			B		
9B	Conley Silty Clay Loam	X			B		
10A	Coughanour Silt Loam	X			NPT		
10B	Coughanour Silt Loam	X			NPT		
10C	Coughanour Silt Loam	X			T		
11C	Cowsly Silt Loam	X			CFT	3.0	99
11D	Cowsly Silt Loam		X		M	3.0	99
12D	Cowsly Very Stony Silt Loam		X		M	3.0	99
13C	Emily Silt Loam		X		M	2.7	106
14C	Emily Cobbly Silt Loam		X		M	2.7	106
15C	Encina Silt Loam			X	NPT	2.3	

Symbol	Map Unit Name	Crop	Forest	Range	Land	AC/ AUM	Cubic Feet
15E	Encina Silt Loam			X	NPT	2.0	
16E	Encina Silt Loam			X	NPT	3.0	
17D	Gwinly Very Cobbly Silt Loam			X	F/M	2.5	
17E	Gwinly Very Cobbly Silt Loam			X	F/M	3.0	
18E	Gwinly-Rockly Complex			X	F/M	4.2	
18F	Gwinly-Rockly Complex			X	F/M	6.3	
19E	Hall Ranch Stony Loam		X		M	2.7	67
19F	Hall Ranch Stony Loam		X		M		67
20F	Hall Ranch Stony Loam		X		M	4.1	67
21E	Helter Silt Loam		X		M		135
21F	Helter Silt Loam		X		M		135
22	Hooly Silt Loam	X			B	0.5	
23	Hoopal Fine Sandy Loam	X			B	0.5	
24	Hoopal Variant Silt Loam	X			B	0.5	
25	Hot Lake Silt Loam	X			B	0.5	
26B	Hutchinson Silt Loam	X			NPT		
26C	Hutchinson Silt Loam	X			NPT		
27D	Hitchinson Gravelly Silt Loam			X	NPT		
28C	Hutchinson Variant Silt Loam		X		NPT	2.7	85
28E	Hutchinson Variant Silt Loam		X		NPT	2.7	85
29B	Imbler Course Sandy Loam	X			T		
30B	Imbler Fine Sandy Loam	X			T		
31	Jett Silt Loam	X			B		
32E	Kamela Very Stony Silt Loam		X		M	3.0	80
33E	Klicker Stony Silt Loam		X		M	2.7	63
33F	Klicker Stony Silt Loam		X		M		69
34F	Klicker Stony Silt Loam		X		M	4.1	63
35E	Klicker –Anatone Complex		X		M	2.8	63
36	LaGrande Silt Loam	X			B		
37	LaGrande Silty Clay Loam	X			B		

Symbol	Map Unit Name	Crop	Forest	Range	Land	AC/ AUM	Cubic Feet
38E	Loneridge Sony Silt Loam		X		M		121
39C	Lookingglass Silt Loam		X		F	2.7	85
40C	Lookingglass Very Stony Silt Loam		X		F	2.7	85
41D	Lookout Very Stony Silt Loam			X	F	2.3	
42C	McMurdie Silt Loam, Bedrock Sub	X			F	1.6	
42D	McMurdie Silt Loam, Bedrock Sub	X			F	2.4	
43C	North Powder Loam			X	M		102
44C	Olot Silt Loam		X		M		102
45E	Olot Stony Silt Loam		X		M		102
45F	Olot Stony Silt Loam		X		M		
46B	Palouse Silt Loam	X			CFT		
46D	Palouse Silt Loam	X			CFT		
46E	Palouse Silt Loam			X	CFT	1.5	
47B	Phys Silt Loam	X			F	1.3	
48B	Phys Gravelly Silt Loam			X	F	1.3	
49	Pits, Gravel						
50C	Ramo Silty Clay Loam	X			F		
50D	Ramo Silty Clay Loam	X			F		
51D	Ramo Very Stony Silty Clay Loam			X	F	1.6	
52C	Ramo-Conley Silty Clay Loam	X			F	1.1	
53C	Ramo-Conley Complex			X	F		
54C	Ramo Variant Silt Loam	X			F		
55D	Rockly Extremely Stony Loam			X	M	5.6	
56E	Royst Very Stony Silt Loam			X	M	1.2	
56F	Royst Very Stony Silt Loam			X	M	1.2	
57C	Ruckles Very Stony Clay Loam			X	M	4.3	
57E	Ruckles Very Stony Clay Loam			X	M	4.3	
57F	Ruckles Very Stony Clay Loam			X	F	4.3	
58E	Starkey Very Stony Silt Loam			X	F	2.5	
59E	Tolo Silt Loam		X		M		102

Symbol	May Unit Name	Crop	Forest	Range	Land	AC/ AUM	Cubic Feet
59F	Tolo Silt Loam		X		M		102
60D	Ukiah Silty Clay Loam			X	F	1.6	
61E	Ukiah-Starkey Complex			X	F	2.0	
62	Umapine Silt Loam			X	B/T	0.5	
63	Urban Land-LaGrande Complex						
64C	Urban Land-Ramo Complex						
65	Urban Land- Veazie Complex						
66	Veazie-Voats Complex	X			B		
67	Veazie-Voats Complex	X			B		
68C	Watama Silt Loam, Moist	X			F	1.0	
69C	Watama-Gwinly Complex			X	F/M	1.5	
70B	Wilkins Silt Loam			X	M	0.7	
71	Wingville Silt Loam	X					
72C	Wolot Silt Loam	X			F		112
112							

From: Irene Gilbert
Sent: Thursday, July 22, 2021 8:02 PM
To: 'dstanish@idahopower.com'; 'lisa@mrg-law.com'; 'jocelyn@mrg-law.com'; 'alisha@mrg-law.com'; 'jstippel@idahopower.com'; 'mike@oxbowlaw.com'; 'kga@integra.net'; TARDAEWETHER Kellen * ODOE; ESTERSON Sarah * ODOE; 'Patrick.g.rowe@doj.state.or.us'; 'jesse.d.ratcliffe@doj.state.or.us'; 'jeff.seeley@doj.state.or.us'; 'fuji@stopb2h.org'; 'jkreider@campblackdog.org'; 'candrew@eou.edu'; 'lkathrynandrew@gmail.com'; 'sbadgerjones@eoni.com'; 'loisbarry31@gmail.com'; 'petebarry99@yahoo.com'; 'browner@eou.edu'; 'mcgccarb@bendbroadband.com'; 'mcooperpiano@gmail.com'; 'deschnerwhit@yahoo.com'; 'onthehoof1@gmail.com'; 'suzannefouty2004@gmail.com'; 'susanmgeer@gmail.com'; 'charlie@gillis-law.com'; 'diannebgray@gmail.com'; 'joehorst@eoni.com'; 'd.janehowell@gmail.com'; 'dmammen@eoni.com'; 'amarch@eoni.com'; 'garymarlette@yahoo.com'; 'wildlandmm@netscape.net'; 'rutnut@eoni.com'; 'moyald@gmail.com'; 'sam.myers84@gmail.com'; 'tranquilhorizonscooperative@gmail.com'; 'squirel@eoni.com'; 'staciajwebster@gmail.com'; 'danno@bighdesign.biz'; 'jondwhite418@gmail.com'; 'wintersnd@gmail.com'; 'marvinroadman@gmail.com'; 'emma.t.borg@doj.state.or.us'; OED_OAH_REFERRAL * OED
Cc: OED_OAH_REFERRAL * OED; SOS Audits * SOS; fred.boss@doj.state.or.us; kate.brown@oregon.gov; BENNER Janine * ODOE
Subject: Re: Ruling and Order on Motion for Summary Determination of Contested Case Issues LU-2, LU-3, LU-5 and LU-6 - In the Matter of Boardman to Hemingway - OAH Case No. 2019-ABC-02833
Attachments: RULING AND ORDER ON MOTION FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUES LU-2, LU-3, LU-5 AND LU-6.rtf.pdf

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I am copying this to the Secretary of State, the Attorney General, the governor and Janine Benner with a request that the information be provided to the Energy Facility Siting Council due to the fact that the actions occurring on this contested case as well as multiple others reflects directly on them. Any future litigation regarding these kinds of decisions will specifically list them as the responsible parties and the Oregon Department of Energy consistently leaves them in the dark regarding their actions while pointing to them in any litigation regarding their decisions.
Please note that I am requesting action from the Secretary of State and the Attorney General as well as making a request to the Energy Facility Siting Council that Ms Webster be removed from conducting this hearing due to her unethical actions which are well documented up to

this point. I will follow up with a complaint to the Oregon Bar and welcome anyone who wants to be included in that complaint.

Ms Webster:

I cannot believe I am wasting my time responding to this transparent effort to support an unsupportable position of the department and Idaho Power, however, in the interests of getting this in the case file, I am making the following comments.

1. The statement in paragraph 2, page 20 or the order that "Idaho Power used soil maps and data from the NRCS SSURGO database to determine the predominant use of the land and make the forest vs. agricultural land designation where soil data was available" is a lie unless you believe that the 1993 document provided by Scott Hartell was the only SSURGO data available. Had the hearings officer actually read Scott Hartell's deposition this would be clear to her.

2. Regarding the statement in paragraph 3 that the county can apply either farm or forest standard based on predominant use of the tract in the combined forest/agricultural zone: If the hearings officer had actually read OAR 660-006-0050(2) she would be aware that the quoted statement is specific to only decisions regarding allowing a party to build a home on the land.

3. To make the statement at the end of this paragraph that the issue of this contested case would not change the outcome of the contested case is a reflection of a total failure to understand the intent of the Oregon Land Use Laws and the evaluation that EFSC is supposed to be making. This issue is repeated in Paragraph 4 in the statement that the department is to evaluate the scale of impact and the developers compliance with minimization measures. Doubling the acres of forest land and evaluating all the resources that are impacted on the land mislabeled certainly is a significant issue and makes a significant change in the outcome that should result from that analysis. For example, it will double the amount of mitigation that Idaho Power needs to pay landowners from the 23 million identified by ODOE in the Proposed Order to approximately 46 million dollars. This is only one of the issues that allowing this breach of Oregon Land Use Laws creates
.
3. The first statement in Paragraph 3 stating that the Oregon Department of Energy says that Idaho Power's arguments are consistent with the Proposed Order is certainly brilliant. Of course the Department supports Idaho Power's arguments. The contested case is because the Proposed Order supports Idaho Power and fails to comply with Oregon Land Use Law.

4. You were provided the STATUTE that states that if the local county did not update their land use plan to comply with the 2008 and 2011 changes to the Land Use Laws, the state law still must be applied. YOU COMPETELY IGNORED THIS AND CONTINUED TO USE THE UNION COUNTY RULES OVER THE STATE STATUTES THROUGHOUT YOUR ORDER.

5. In paragraph one on Page 22 you again attempt to grasp at straws to support Idaho Power and the department by stating that my Draft Proposed Order Comments failed to specifically state that there was a problem with the use of 63 cubic feet per acre per year to determine what was considered "forest land". While it was clear that Idaho Power had not correctly identified

forest land in the county, Scott Hartell would not provide me the information necessary to prove this prior to the deposition. The courts have determined that the only requirement for me to pursue this issue is that I identify the "ISSUE" which was the incorrect identification of forest land. You have consistently denied the public access to contested cases based upon this kind of requirement that goes beyond what the courts have defined as being required. This issue needs to be investigated by the Oregon Secretary of State and the Attorney General as it is a clear abuse of your power
and denies the public access to contested cases.

You were also provided documentation showing that ALL the land in the forest/agricultural designation should have had a soil capacity determination made in order to determine what was forest land. Mr. Hartell's deposition makes it clear that the only soils capacity determinations that were made were those done in 1993 and provided in the exhibit. Did you pay any attention to what he said?

6. A person with the label of "hearings officer" should be embarrassed to make a statement like the last sentence in paragraph 2 of Page 22 saying "Idaho Power also notes that Ms. Gilbert did not state with any specificity how the UCZPSO is inconsistent with any land use statute or administrative rule." Only someone running a Kangaroo Court or trying to support an unsupportable decision could possibly have the gall to make such a statement in light of all the evidence,
testimony, court decisions, rules and statutes that you have been presented with.

7. Your decision starting in paragraph 3 on Page 22 and continuing through Paragraph 3 of Page 23 reflects the fact that you did not actually read the documents you claim you used in making this decision. The things you claim were not documented were indeed included in the information I presented to you.

8. I am forwarding this cursory review of the order to the Attorney General, the Energy Facility Siting Counsel, and the Secretary of State requesting your removal as hearings officer for this development. You clearly are not able to provide an unbiased review of issues related to the Boardman to Hemingway Transmission Line. I am further going to submit this document to the Oregon Bar with a complaint and request for review of your application of the Summary Determination Laws of this state. I will identify additional documentation supporting my complaint prior to submitting it. The file for this site certificate provides documentation that should result in you being disbarred..

On Wednesday, July 21, 2021, 02:52:58 PM PDT, OED_OAH_REFERRAL * OED <referral.oed_oah_referral@oregon.gov> wrote:

Good Afternoon,

On behalf of Senior Administrative Law Judge Alison Greene Webster, please see attached, Ruling and Order on Motion for Summary Determination of Contested Case Issues LU-2, LU-3, LU-5 and LU-6, in the above-referenced matter.

Please let our office know if you have any issues opening or viewing the attached document.

Thank you,

Anesia Valihov | Hearings Coordinator

Office of Administrative Hearings

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From: Irene Gilbert
Sent: Thursday, July 29, 2021 11:44 AM
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Cc: OED_OAH_REFERRAL * OED; Ted Sickinger; SOS Audits * SOS; SOS Oregon * SOS; fred.boss@doj.state.or.us
Subject: Re: Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3 - In the Matter of Boardman to Hemingway - OAH Case No. 2019-ABC-02833
Attachments: RULING AND ORDER ON MOTIONS FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUES N-1, N-2, AND N-3 .pdf

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Should the public laugh at the fact that this hearings officer is continuing to document her lack of ethics by throwing out legitimate contested cases? At my last count I believe this means that Ms. Webster has determined that none of the 18 contested cases that Idaho Power and the Oregon Department of Energy asked her to throw out without a hearing deserve to have their issues heard. I am wondering why the Oregon Department of Energy and Idaho Power did not just submit a one liner requests for every contested case request be denied because none of them showed that there was any disagreement regarding the facts or interpretations made by Idaho Power and the Oregon Department of Energy even when she weighted her decisions in a manner that was favorable to the public as she claims she is doing.. Instead, there were thousands of hours spent by multiple citizens of this state who

were lead to believe that they would receive fair treatment by an "impartial hearings officer". Clearly that is not the case.

This is being forwarded to Janine Benner and Todd Cornett as I am requesting that this document be added to the growing pile of issues that I am requesting be provided to counsel in support the fact that this hearings officer must be replaced with someone who at least tries to give the impression that they are reviewing the information and making legitimate decisions. I would appreciate receiving notice regarding when the Council will be addressing the request for this ladies removal so that I can make sure all the material that supports her prejudicial actions is before them. Ms. Webster must be removed as hearings referee due to her documented prejudicial treatment of the public in her role as hearings officer. This lady is setting new records with every decision she makes and I am requesting that all the decisions she has made be reconsidered by the Council in light of the arguments made by the public in opposition to her throwing out their cases. I am not alone in believing that all these actions represent a process where the outcome is predetermined and the hearings referee is simply going through the motions required to try to support the outcome. No reasonable human being could believe that all these contested cases which were requested by multiple different members of the public do not have issues of fact or law that need to be heard in contested cases. Ms Webster obviously skipped over the part of her role that mandates that she provide a fair and neutral evaluation of issues and the the public be allowed to present their arguments and documents in the contested case process. Ms. Websters actions are likely to land this corrupt contested case process in court for a very long time. It certainly will go down in history as one of the biggest black eyes that the Oregon Department of Energy and Siting Counsel get credited for if the Siting Counsel fails to remove Ms. Webster and have all the trumped up denials thrown out so that someone with ethics and an understanding of their role makes the decisions. The public has jumped through the multiple barriers that this lady has placed before them and now she is using a legal manipulation that is not allowed by Counsel Rules to do what she believes will be her final act to put the public in their place

Please see that this additional document is added to the file for the Secretary of State and supporting the need for an audit of the Siting Division and the kinds of manipulations of the law that are reflected in their contested cases. Please also see that this decision is added to the Department of Justice files supporting the fact that their attorney is displaying prejudice to the extent that no person could deny that it is occurring.

I am requesting that Kate Brown direct the Oregon Secretary of State to investigate the actions that have occurred during this contested case process.

While I am quite sure that the requests of the Oregon Department of Justice and the Secretary of State will not result in any action to correct the situation, I nonetheless feel compelled to document the events as at some point the legislature or the courts or the Oregon Bar will be in a position to address the issues I am documenting..

On Thurs day, July 29, 2021, 10:39:50 AM PDT, OED_OAH_REFERRAL * OED <referral.oed_oah_referral@oregon.gov> wrote:

Hello,

Please see attached, Ruling and Order on Motions for Summary Determination of Contested Case Issues N-1, N-2, and N-3, in the above-captioned matter. Please let our office know if you have any issues opening or viewing the attached document.

Thank you,

Anesia Valihov | Hearings Coordinator

Office of Administrative Hearings

Phone: (503) 947-1510

Email: OED_OAH_REFERRAL@oregon.gov

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF ENERGY

IN THE MATTER OF:	)	**RULING AND ORDER ON MOTIONS**
	)	**FOR SUMMARY DETERMINATION**
THE APPLICATION FOR SITE	)	**OF CONTESTED CASE ISSUES N-1, N-**
CERTIFICATE FOR THE	)	**2, AND N-3**
BOARDMAN TO HEMINGWAY	)	
TRANSMISSION LINE	)	OAH Case No. 2019-ABC-02833
	)	

INTRODUCTION

On May 28, 2021, in accordance with the January 14, 2021 *Order on Case Management Matters and Contested Case Schedule* (*Case Management Order),* Applicant Idaho Power Company (Idaho Power) filed a Motion for Summary Determination of Contested Case Issues N-1, N-2, and N-3 (Idaho Power Motion), seeking summary determination in its favor on the Need Standard (N) issues in this contested case.[1] Also on May 28, 2021, the Oregon Department of Energy (Department or ODOE) filed a Motion for Summary Determination on Issue N-2 for Limited Party Stop B2H Coalition (Department Motion).

The *Amended Order on Party Status* granted the Stop B2H Coalition (Stop B2H) status as a limited party with standing on Issues N-1, N-2, and N-3.[2] This ruling addresses Idaho Power's Motion on Issues N-1, N-2 and N-3 and the Department's Motion on Issue N-2.

Pursuant to the *Case Management Order,* the deadline for filing a response to a timely filed motion for summary determination was June 25, 2021. On that date, Stop B2H filed its Memorandum in Opposition to Idaho Power and the Department's Motions (Stop B2H Response). On June 25, 2021, the Department also filed a timely response to Idaho Power's Motion regarding Issues N1, N-2, and N-3, expressing support for rulings in Idaho Power's favor.

On July 9, 2021, Idaho Power filed a Reply to Stop B2H's Response to Idaho Power's

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[1] The issues to be considered in this contested case pursuant to ORS 469.370(3) and OAR 345-015-0016(3) are set out in the table at pages 77-82 of the *Amended Order on Party Status, Authorized Representatives and Properly Raised Issues for Contested Case* (*Amended Order on Party Status*) issued December 4, 2020, and restated in the Table of Identified Issues incorporated into the *Order on Case Management* at pages 3-8.

[2] Stop B2H has limited party status on eight other issues, two of which are subject to motions for summary determination.

Motion for Summary Determination of Contested Case Issues N1, N-2, and N-3 (Idaho Power Reply). That same date, the Department filed its Reply to Stop B2H's Response on Motion for Summary Determination on Issue N-2 (Department Reply).

ISSUES

1. Whether Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue N-1: Whether the Department erred in defining capacity in terms of kilovolts instead of megawatts.

2. Whether Idaho Power and/or the Department are entitled to a favorable ruling as a matter of law on Contested Case Issue N-2: Whether in evaluating capacity, the Department applied balancing considerations in contravention of OAR 345-022-0000(3)(d).

3. Whether Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue N-3: Whether Applicant demonstrated need for the proposed facility when Applicant has only shown that its needs represent 21 percent of the total capacity.

DOCUMENTS CONSIDERED

The ALJ considered the following documents in ruling on the motions:

(1) Idaho Power's Motion for Summary Determination of Issues N-1, N-2, and N-3, with Exhibit A (Affidavit of Zachary Funkhouser) and Exhibit B (Affidavit of Lisa Rackner and Attachments 1 and 2);

(2) The Department's Motion for Summary Determination of Issue N-2;

(3) Stop B2H's Response;

(4) The Department's Response to Idaho Power's Motion;

(5) Idaho Power's Reply, with Exhibit A (OPUC Docket LC 4, Order No. 21-184) and Exhibit B (Affidavit of Jared Ellsworth);

(6) The Department's Reply; and

(7) Identified documents in the Decision-Making and Administrative Project Record for the Boardman to Hemingway Transmission Line (B2H Project Record).[3]

UNDISPUTED FACTS

1. On July 17, 2017, Idaho Power submitted to the Department its Amended Preliminary Application for Site Certificate (ASC) for the Boardman to Hemingway Transmission Line

[3] The B2H Project Record was admitted into the contested case hearing record by order of the ALJ's *Response to ODOE's Inquiry Re: Marking and Submitting Exhibits,* issued May 26, 2021.

Project (B2H Project). The Department determined the ASC to be complete on September 21, 2018. The ASC consists of 30 separate exhibits (Exhibits A through DD) and associated attachments.[4] (Affidavit of Zachary Funkhouser, Exhibit A to Idaho Power's Motion.)

2. In preparing the ASC, Idaho Power engaged numerous outside consultants and numerous subject matter experts within Idaho Power to conduct research, analyze, and report on matters pertinent to its application for the proposed transmission line. The ASC accurately reflects the research, analysis and conclusions of the outside consultants and the Idaho Power subject matter experts who developed and drafted the various components of the ASC. (Funkhouser Aff., Exhibit A to Idaho Power's Motion.)

3. In ASC Exhibit N, Idaho Power provided the information required by OAR 345-021-0010(1)(n),[5] for the Council to evaluate the need for the B2H Project under OAR 345-023-0005(1). The introduction to ASC Exhibit N states as follows:

> *The need for the Boardman to Hemingway Transmission Line Project (Project) is established by showing the Public Utility Commission of Oregon has acknowledged the Project in Idaho Power Company's (IPC) Integrated Resource Plan.* Additionally, and in the alternative, IPC demonstrates need by showing the Project is needed to meet the company's firm capacity demands or firm annual electricity sales; the Project is consistent with North American Electric Reliability Corporation (NERC) reliability standards; and the Project is an economically reasonable means of meeting the company's needs and NERC standards.

(ODOE - B2HAPPDoc3-22 ASC 14a_Exhibit N_Need_ASC_Part 1 2018-09-28, page 5, emphasis added.)

4. As attachments to Exhibit N, Idaho Power included, among other things, its 2009 Integrated Resource Plan (IRP), its 2011 IRP, its 2013 IRP, its 2015 IRP, and its 2017 IRP, along with orders issued by the Oregon Public Utilities Commission (OPUC) acknowledging the IRPs. (ODOE - B2HAPPDoc3-22 ASC 14a_Exhibit N_Need_ASC_Part 1 2018-09-28, pages 31 to 1076; ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28, pages 1 to 2033.)

5. An IRP is a planning document that Idaho Power must file with the OPUC on a biannual basis.[6] OAR 860-027-0400.

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[4] As discussed further herein, OAR 345-021-0010 governs the contents of an application for site certificate. The rule requires that an applicant include in the application information addressing each provision of the rule identified in the project order and "designate the information with the appropriate exhibit label." OAR 345-021-0010(1). The rule lists 30 separate exhibits, Exhibit A through Exhibit DD.

[5] As set out below, OAR 345-021-0010(1)(n) requires "information about the need for the facility, providing evidence to support a finding by the Council as required by OAR 345-023-0005."

[6] OAR 860-027-0400 states in pertinent part:

6. The objective of an IRP is to ensure an adequate and reliable supply of energy at the least cost to the utility and customers in a manner consistent with the long-run public interest. As the OPUC explained in its disposition on Idaho Power's 2017 IRP:

> The IRP provides extensive opportunity for the provision of broad input from a range of stakeholders, and public participation and input is a central goal of the IRP. This input, along with IRP guideline requirements that ensure a detailed and wide-ranging review of resource options, technology advancements, pricing scenarios and risk profiles are intended to test the conclusions of the utility.

(ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28, page 2018.)

7. The OPUC requires each regulated energy utility to prepare and file an IRP within two years of acknowledgement of the utility's last plan. In the IRP, the energy utility must do the following: (1) evaluate resources on a consistent and comparable basis; (2) consider risk and uncertainty; (3) aim to select a portfolio of resources with the best combination of expected costs and associated risks and uncertainties for the utility and its customers; and (4) create a plan that is consistent with the long-run public interest as expressed in Oregon and federal energy policies. (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28, page 1979.)

8. Once a utility completes its biannual IRP, the OPUC reviews the plan for compliance with OPUC guidelines. OPUC may generally acknowledge the IRP, *i.e.*, find it reasonable based on the information available at the time, or return the IRP to the utility with comments. The OPUC may also decline to acknowledge specific action items in a utility's IRP if the OPUC questions whether the utility's proposed resource decision presents the least cost and risk option for its customers. (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28, page 1979.)

9. Idaho Power identified the B2H Project as a part of its preferred resource portfolio in its IRPs in 2009, 2011, 2013 and 2015. In Idaho Power's 2017 IRP, the B2H Project was a

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> (1) Scope and Applicability: This rule applies to investor-owned energy utilities. Upon application by an entity subject to this rule and for good cause shown, the Commission may relieve it of any obligation under this rule.
>
> (2) As used in this rule, "Integrated Resource Plan" or "IRP" means the energy utility's written plan satisfying the requirements of Commission Order Nos. 07-002, 07-047 and 08-339, detailing its determination of future long-term resource needs, its analysis of the expected costs and associated risks of the alternatives to meet those needs, and its action plan to select the best portfolio of resources to meet those needs.
>
> (3) An energy utility must file an IRP within two years of its previous IRP acknowledgment order or as otherwise directed by the Commission. If the energy utility does not intend to take any significant resource action for at least two years after its next IRP is due, the energy utility may request an extension of its filing date from the Commission.

central feature. In this regard, in its review of Idaho Power's 2017 IRP, the OPUC noted as follows in acknowledging the IRP with modifications and exceptions:

> The central feature of Idaho Power's 2017 IRP is the B2H project. The B2H project has been identified as part of the preferred resource portfolio in Idaho Power's 2009, 2011, 2013, and 2015 IRPs. Several groups formed to oppose this project and, along with many individual interested citizens, participated actively and constructively in this IRP process. Many groups and individuals are concerned about the land use and environmental impacts of B2H and share a preference for demand-side and distributed, clean energy alternatives to B2H. It is our view that the robust participation of citizen groups and individuals has supported a better and fuller understanding of the issues associated with the B2H project and other IRP issues. *Although we acknowledge Idaho Power's selection of the B2H project as a least cost, least risk resource to meet the needs of its customers, we remain grateful for the hard work, dedication, knowledge, and passion of all stakeholders in this process*.

OPUC Order No. 18-176. (ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28, page 2017; emphasis added.)

10. In Order No. 18-176, the OPUC found as follows with regard to the B2H Project IRP Action Items Five (ongoing permitting, planning studies, and regulatory filings for the B2H Project, and preliminary construction activities) and Six (construction) in the 2017 IRP:

> We acknowledge B2H Action Item 5 to conduct ongoing permitting, planning studies, and regulatory filings for the B2H transmission line, as well as Action Item 6 to conduct preliminary construction activities, acquire long-lead materials, and construct the B2H project. We clarify that this determination is limited to our IRP standards and that, in acknowledging these action items, we do not interpret or apply the standards of any other state or federal agency. *Through our acknowledgement we find that these action items are reasonable components of Idaho Power's resource plan based on the information available at this time*.
>
> *Our acknowledgement of Action Item 6 is based on our finding of its reasonableness, according to the information we possess today, in the context of Idaho Power's entire IRP*. Our decision does not mean that Action Item 6 is the only possible option for meeting Idaho Power's resource needs, [it] *simply means that we are satisfied that it is the least cost., least risk resource for meeting the demonstrated resource needs of Idaho Power's customers.* We recognize that there may be other ways of meeting the capacity needs identified in this IRP that may not have the same impacts to eastern Oregon as B2H. In this proceeding, however, we do not find that any such alternatives have been demonstrated to be lower cost and lower risk, based on the information presented.

* * * * *

> *Our decision is supported by the fact that B2H has been prioritized over multiple portfolios in different IRPs using numerous different modeling concepts and reflecting many different assumptions. While presence in numerous IRPs is not determinative for our acknowledgement judgement, it is indicative to us of sustained value that has remained robust across industry and market changes to date. In each of these portfolios, B2H has proven to be a low-cost resource that provides considerable value to the system.* While we are sensitive to the arguments that the utility industry is in flux, and that technological changes are impacting the system in unanticipated ways, we have not seen information presented as part of this IRP process indicating that large-scale transmission resources will not be an important part of future utility systems. We recognize that B2H has the potential to create significant regional benefits and could represent a tool for allocating and moving a diverse set of new low-carbon resources across the west.
>
> Transmission [lines] must be developed with very long lead times. Because circumstances may change in the future, and new information may be presented at a later date, the ultimate development of the B2H project is not a foregone conclusion. * * * .
>
> *Based on what we know today, however, we find that the plan to construct the B2H project is reasonable and should be acknowledged subject to the conditions outlined in Staff s memo*.

(ODOE - B2HAPPDoc3-23 ASC14b_Exhibit N_Need_ASC_Part 2 2018-09-28, page 2025-27; emphasis added.)

11. In the Proposed Order, with regard to the General Standard of Review, OAR 345-022-0000, the Department asserted that a "preponderance of evidence on the record supports the conclusion" that the proposed facility complies with the requirements of the Council's siting standards all other pertinent statutes and rules applicable to the issuance of a site certificate for the proposed facility. (ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, pages 59-60.) The Department then noted as follows:

> If an applicant shows that the proposed facility cannot meet Council standards or has shown that there is no reasonable way to meet the Council standards through mitigation or avoidance of any adverse effects on a protected resource or interest, OAR 345-022-0000(2) and (3) establish criteria the Council may use to make a balancing determination. Here, the applicant does not assert that the proposed facility cannot meet an applicable Council standard. Therefore, OAR 345-022-0000(2) and (3) do not apply to this review.

(*Id.* at 60, n. 60.)

12. In the Proposed Order, with regard to Council's Need Standard for Nongenerating Facilities and the Least Cost Plan, the Department determined that Idaho Power met the standard

based on the OPUC's acknowledgement of Idaho Power's plan to construct the B2H Project. The Proposed Order states as follows:

> Each of these IRPs (2009, 2011, 2013, 2015, and 2017) identifies the proposed Boardman to Hemingway Transmission Line as part of the applicant's preferred resource portfolio. The OPUC acknowledged the ongoing permitting, planning studies, and regulatory filings for the proposed facility as part of the 2013 IRP, but at that time declined to acknowledge the construction phase of the proposed facility because the timing of the construction phase was beyond the two-to-four year period for action items specified by IRP Guidelines. In a January 2018 request for additional information, the Department informed the applicant that the Department and Council would not consider OPUC acknowledgement of only ongoing permitting, planning, and regulatory filings associated with the proposed facility as meeting the requirements in OAR 345-023-0020. *The Department informed the applicant that it and the Council would only consider the Least Cost Plan Rule and Need Standard met if the OPUC acknowledged the ongoing permitting, planning studies, and regulatory filings for the proposed facility as well as an acknowledgement of construction of the proposed facility*.
>
> *OPUC Order No. 18-176 (OPUC acknowledgement of the applicant's 2-017 IRP) acknowledges both the ongoing permitting, planning, and regulatory filings and to conduct preliminary construction activities, acquire long-lead materials, and to construct the proposed facility. Therefore, because the OPUC's order included acknowledgment of construction-related activities, the applicant has demonstrated the need for the facility under OAR 345-023-0020(2),* "The Council shall find that a least-cost plan meets the criteria 1 of an energy resource plan described in section (1) if the Public Utility Commission of Oregon has acknowledged the least cost plan," that and accordingly the applicant has demonstrated the need for the facility under OAR 345-023-0005(1), and the Council must find that the Need Standard has been met.

(ODOE - B2HAPPDoc2 Proposed Order on ASC and Attachments 2019-07-02, pages 605-606; emphasis added, footnotes and citations omitted.)

13. In its Second Amended 2019 IRP (dated February 5, 2021) Idaho Power identified the construction of the B2H Project by 2026 as one of its three key short-term (2020-2026) Action Plans. (Idaho Power Motion, Exhibit B (Rackner Aff.), Attachment 1 at 6.)

14. At a public meeting held April 15, 2021 pertaining to Idaho Power's 2019 IRP, the OPUC again acknowledged the need for the B2H Project as part of Idaho Power's preferred portfolio and the action plan to construct the proposed facility. (Idaho Power Reply, Exhibit A, OPUC Order No. 21-184.) In its Acknowledgment of Idaho Power's 2019 IRP, OPUC stated, in pertinent part, as follows with regard to the B2H Project Action Plan Items:

> Action plan items nos. 3 and 4 relate to ongoing B2H permitting activities, negotiations with B2H partners, preliminary construction activities, acquiring

long-lead materials, and constructing B2H. *The B2H transmission project involves permitting, constructing, operating and maintaining a new single-circuit 500-kV transmission line approximately 300 miles long* between the proposed Longhorn Station near Boardman, Oregon and the existing Hemingway Substation in southwest Idaho. Idaho Power states that this project will provide the lowest cost, lowest risk capacity resource to meet identified capacity needs commencing in 2026. *Idaho Power plans to meet capacity needs through market purchases facilitated by the development of the line.*

* * * * *

STOP B2H argues that the B2H project should not be acknowledged and that the central premise of the project, that it can deliver lower cost energy from Mid-C, has not been sufficiently tested. STOP B2H recommends Idaho Power complete a more robust market analysis, including markets beyond the Mid-C, for potentially advantageous alternatives to meeting its capacity needs. ** * * STOP B2H also believes that, in Idaho Power's 2017 IRP, we acknowledged only Idaho Power's 21 percent of a 2,050 MW bi-directional transmission line, and requests that we affirm this understanding of the limited nature of our previous acknowledgment.*

* * * * *

Resolution:

We acknowledge action items nos. 3 and 4, regarding the Boardman to Hemingway (B2H) project. By doing so, we find that these action items related to B2H are reasonable at this time and for this IRP, given the information developed through our IRP processes. We agree with Staff that a cost contingency for the project is necessary, and that developing an appropriate contingency is an important and standard part of consideration of a resource of this character. *In response to comments for clarification from STOP B2H, we will allow the 2017 IRP Order to speak for itself. We affirm here that we acknowledge the B2H project action items in this IRP, which are applicable to the proposed project as it is presented in the company's Second Amended 2019 IRP, which includes a 500 kV transmission line with the partnership arrangement as described by Idaho Power*.

Our acknowledgment means that the action plan items pertaining to this project, as currently presented, meet our guidelines of least-cost, least-risk planning for customers. We emphasize it is not a determination of the prudency of the overall project, nor are we granting Idaho Power cost recovery for any portion of the B2H project as proposed at this time. A prudency review and ratemaking decisions will occur in future proceedings, at such times as those determinations are required. As described by Idaho Power in its Second Amended 2019 IRP, the activities and actions that move the B2H project forward will continue to require ongoing analysis in future IRPs and other proceedings. Those future proceedings can and

> will involve continued review and analysis of the B2H project, and will continue to test the assumptions and projections that justify the proposed actions.
>
> We note that, in general, the analysis presented supports the project. The project is reasonably modeled, meaning that core assumptions underlying the analysis such as projected market prices, capacity needs, and resource costs have been tested by stakeholders and fall within a reasonable range. In multiple scenarios, the B2H project remains cost-competitive, even in scenarios where fundamentals not favorable to the project are tested, such as where the cost contingency is triggered and under a variety wholesale energy cost estimates. *Throughout these scenarios, Idaho Power has demonstrated that the project is reasonable, and given the information available today, the projected least-cost, least-risk option*.

(*Id.* at 13-15; emphasis added.)

15. Transmission lines under development are rated by kilovolts (kV). A transmission line's megawatt (MW) rating is determined in later-stage development of the project. When a transmission line provider seeks to construct a transmission line, the provider determines the size of the line by virtue of the kV rating. High voltage transmission lines are generally sized at 230 kV, 345 kV or 500 kV. The higher the kV rating, the more capacity the transmission line is capable of providing. (Idaho Power Reply; Exhibit B, Ellsworth Aff.)

CONCLUSIONS OF LAW

1. Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue N-1: The Department did not err in defining capacity in terms of kilovolts for purposes of evaluating the need for the B2H Project under the Least-Cost Plan Rule.

2. Both Idaho Power and the Department are entitled to a favorable ruling as a matter of law on Contested Case Issue N-2: The Department concluded that Idaho Power demonstrated the need for the facility under the Least-Cost Plan Rule, OAR 345-023-0020(2), and did not apply balancing considerations to the Need Standard in contravention of OAR 345-022-0000(3)(d).

3. Idaho Power is entitled to a favorable ruling as a matter of law on Contested Case Issue N-3: Applicant demonstrated the need for the proposed facility under the Least-Cost Plan Rule in accordance with OAR 345-023-0005(1) and OAR 345-023-0020(2).

OPINION

1. *Standard of Review for Motion for Summary Determination*

As set out in the *Order on Case Management,* OAR 137-003-0580 sets out requirements and the standard for granting summary determination in contested case proceedings. The rule states, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
>
> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

In *Watts v. Board of Nursing*, 282 Or App 705 (2016), the Oregon Court of Appeals clarified the standard for granting motions for summary determination in administrative proceedings, stating:

> The board can grant a motion for summary determination only if the relevant documents, including affidavits, create "*no* genuine issue as to any material fact that is relevant to resolution of the legal issue." OAR 137-003-0580(6)(a) * * *. If there is evidence creating a relevant fact issue, then no matter how "overwhelming" the moving party's evidence may be, or how implausible the nonmoving party's version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing.

282 Or App 714; emphasis in original. *See also Wolff v. Board of Psychologist Examiners*, 284 Or App 792 (2017).

Similarly, in *King v. Department of Public Safety Standards and Training*, 289 Or App 314 (2017), the court stated:

> Issues may be resolved on a motion for summary determination only where the application of law to the facts requires a single, particular result. Therefore, the issues on summary determination must be purely legal.

289 Or App 321; internal citations omitted.

These cases make clear that summary determination may only be granted when there are no relevant facts in dispute and the question(s) to be resolved are purely legal.

2. *Applicable Law Regarding the Council's Need Standard for Nongenerating Facilities*

The term "energy facility" is defined in ORS 469.300(11)(a) as follows:

(11)(a) "Energy facility" means any of the following:

* * * * *

(C) *A high voltage transmission line of more than 10 miles in length with a capacity of 230,000 volts or more* to be constructed in more than one city or county in this state, but excluding:

(i) Lines proposed for construction entirely within 500 feet of an existing corridor occupied by high voltage transmission lines with a capacity of 230,000 volts or more;

(ii) Lines of 57,000 volts or more that are rebuilt and upgraded to 230,000 volts along the same right of way; and

(iii) Associated transmission lines.

(Emphasis added.)

As pertinent here, ORS 469.501(1)(i) states as follows:

(1) The Energy Facility Siting Council shall adopt standards for the siting, construction, operation and retirement of facilities. The standards may address but need not be limited to the following subjects:

* * * * *

(L) *The need for proposed nongenerating facilities as defined in ORS 469.503*, consistent with the state energy policy set forth in ORS 469.010 and 469.310. *The council may consider least-cost plans when adopting a need standard or in determining whether an applicable need standard has been met.* The council shall not adopt a standard requiring a showing of need or cost-effectiveness for generating facilities as defined in ORS 469.503.

(Emphasis added.)

To implement ORS 469.501(1)(L), the Council adopted OAR 345-023-0005, the Need Standard for Nongenerating Facilities:

This division applies to nongenerating facilities as defined in ORS 469.503(2)(e), except nongenerating facilities that are related or supporting facilities. To issue a

site certificate for a facility described in sections (1) through (3), *the Council must find that the applicant has demonstrated the need for the facility*. The Council may adopt need standards for other nongenerating facilities. This division describes the methods the applicant shall use to demonstrate need. In accordance with ORS 469.501(1)(L), the Council has no standard requiring a showing of need or cost-effectiveness for generating facilities. The applicant shall demonstrate need:

(1) *For electric transmission lines under the least-cost plan rule, OAR 345-023-0020(1), or the system reliability rule for transmission lines, OAR 345-023-0030,* or by demonstrating that the transmission line is proposed to be located within a "National Interest Electric Transmission Corridor" designated by the U.S. Department of Energy under Section 216 of the Federal Power Act[.].

OAR 345-023-0020, the **Least-Cost Plan Rule**, states, in pertinent part:

(1) The Council shall find that the applicant has demonstrated need for the facility if the capacity of the proposed facility or a facility substantially similar to the proposed facility, as defined by OAR 345-001-0010, is identified for acquisition in the short-term plan of action of an energy resource plan or combination of plans adopted, approved or acknowledged by a municipal utility, people's utility district, electrical cooperative, other governmental body that makes or implements energy policy, or electric transmission system operator that has a governance that is independent of owners and users of the system and if the energy resource plan or combination of plans:

* * * * *

(2) *The Council shall find that a least-cost plan meets the criteria of an energy resource plan described in section (1) if the Public Utility Commission of Oregon has acknowledged the least cost plan.*

OAR 345-023-0030, the **System Reliability Rule** for Electric Transmission Lines, states:

The Council shall find that the applicant has demonstrated need for an electric transmission line that is an energy facility under the definition in ORS 469.300 if the Council finds that:

(1) The facility is needed to enable the transmission system of which it is to be a part to meet firm capacity demands for electricity or firm annual electricity sales that are reasonably expected to occur within five years of the facility's proposed in-service date based on weather conditions that have at least a 5 percent chance of occurrence in any year in the area to be served by the facility;

(2) The facility is consistent with the applicable mandatory and enforceable North American Electric Reliability Corporation (NERC) Reliability Standards in effect

> as of September 18, 2015 as they apply either internally or externally to a utility system; and
>
> (3) Construction and operation of the facility is an economically reasonable method of meeting the requirements of sections (1) and (2) compared to the alternatives evaluated in the application for a site certificate.

(Emphasis added.)

> OAR 345-022-0000, the General Standard of Review, states in pertinent part,
>
> (2) The Council may issue or amend a site certificate for a facility that does not meet one or more of the applicable standards adopted under ORS 469.501 if the Council determines that the overall public benefits of the facility outweigh any adverse effects on a resource or interest protected by the applicable standards the facility does not meet. *The Council shall make this balancing determination only when the applicant has shown that the proposed facility cannot meet applicable Council standards* or has shown, to the satisfaction of the Council, that there is no reasonable way to meet the applicable Council standards through mitigation or avoidance of any adverse effects on a protected resource or interest. The applicant has the burden to show that the overall public benefits outweigh any adverse effects on a resource or interest, and the burden increases proportionately with the degree of adverse effects on a resource or interest. The Council shall weigh overall public benefits and any adverse effects on a resource or interest as follows:
>
> * * * * *
>
> (3) *Notwithstanding section (2) of this rule, the Council shall not apply the balancing determination to the following standards:*
>
> * * * * *
>
> (d) *The need standards described in OAR 345-023-0005[.]*

(Emphasis added.)

OAR 345-021-0010(1), the Council rule setting out the required contents of an ASC for purposes of the Need Standard states, in pertinent part:

> **Exhibit N.** If the proposed facility is a non-generating facility for which the applicant must demonstrate need under OAR 345-023-0005, information about the need for the facility, providing evidence to support a finding by the Council as required by OAR 345-023-0005, including:

(A) Identification of the rule in Division 23 of this chapter under which the applicant chooses to demonstrate need;

(B) If the applicant chooses to demonstrate need for the proposed facility under OAR 345-023-0020(1), the least-cost plan rule:

(i) Identification of the energy resource plan or combination of plans on which the applicant relies to demonstrate need;

(ii) The name, address and telephone number of the person responsible for preparing each energy resource plan identified in subparagraph (i);

(iii) For each plan reviewed by a regulatory agency, the agency's findings and final decision, including:

(I) *For a plan reviewed by the Oregon Public Utility Commission, the acknowledgment order*; * * *.

3. *Idaho Power's Motion on Issue N-1*

Stop B2H has limited party status with standing on Issue N-1, which states, "[w]hether, in evaluating the capacity of the proposed facility, the Department erred in defining capacity in terms of kilovolts (operating voltage of the transmission line) instead of megawatts (the capacity of the proposed line to transfer power)."[7]

In its petition for party status, Stop B2H argued that the Department erred when, in the Proposed Order, it evaluated the need for the B2H Project in terms of kV rather than MW. Stop B2H asserts that the term "capacity," as used in the Need Standard, is not defined and nothing in the text of the rule suggests that capacity means kilovolts. Stop B2H Petition at 4. Stop B2H argues that the Department's approach (in describing the proposed facility's capacity in terms of kV) is arbitrary, it ignores the plan language of the Need Standard, and is "inconsistent with the applicable and mandatory and enforceable North American Electric Reliability Corporation (NERC) Reliability Standards, itself a violation of the clear requirements of OAR 345-023-0030(2)." *Id.* at 5-6.

In its Motion, Idaho Power concedes that in the Proposed Order the Department evaluates the need for the B2H Project by referencing the size of the line in kV instead of the line's capacity in MW. Idaho Power asserts that whether this evaluation was appropriate under the Need Standard is a matter appropriate for summary determination because it presents purely a question of law. Idaho Power also contends that it is entitled to a favorable ruling on Issue N-1 as a matter of law because: (1) the statutory definition of high-voltage transmission facilities refers to voltage, not wattage;[8] (2) the Need Standard does not require that capacity be evaluated

[7] *Amended Order on Party Status* at pages 18-19.

[8] ORS 469.300(11)(a)(C), defines "energy facility" to include a "high voltage transmission line of more than 10 miles in length *with a capacity of 230,000 volts* or more * * *."

in terms of MW; and (3) the Council is entitled to evaluate the size of a project using kV. Idaho Power Motion at 12-13.

In its Response, the Department notes that Idaho Power's legal arguments are consistent with the Proposed Order's analysis in Section IV.O.1, discussing the need for the facility. The Department adds that, in analyzing the proposed facility's capacity, the Proposed Order relies upon the statutory definition of high-voltage transmission line (ORS 469.300(11)(a)(C)), where capacity is not otherwise defined within the Need Standard under the Least Cost Plan Rule or the System Reliability Rule. Then, based on the transmission line's 500kV size, the Proposed Order evaluates the proposed facility's ability to comply with the Need Standard. Department Response at 4.

In its opposition to Idaho Power's Motion on Issue N-1, Stop B2H argues that although the definition of energy facility/high voltage transmission line (ORS 469.300(11)(a)(C)) references capacity in terms of volts, the term capacity, as used in the Need Standard, means megawatts, instead of kV. Stop B2H argues, "[i]f the Need Standard had intended to describe the acquisition of voltage, and not MW, the Standard would have used the term voltage, it does not." Stop B2H Response at 9. Stop B2H also notes that, under the System Reliability Rule, capacity is premised on the use of MW, and an applicant who chooses to demonstrate need under that rule (OAR 345-023-0030) must compile specific information, including load-resource balance tables, firm capacity demands, and peak hour load and resource balance data. *Id.* Stop B2H asserts that it "makes no sense" to claim that capacity means something different under the System Reliability Rule than it does under the Least-Cost Plan rule (OAR 345-023-0020). *Id.* at 10. In addition, Stop B2H contends that both the Federal Energy Regulatory Commission (FERC) and the Western Electricity Coordinating Council (WECC) require that capacity for transmission lines be expressed in MW. *Id.*

In its Reply, Idaho Power argues that Stop B2H's arguments lack merit. Idaho Power asserts that defining capacity by reference to kV for purposes of the Least-Cost Plan rule remains the only reasonable and practical approach because transmission lines under development are rated in kV and not MW. Idaho Power explains that when an energy utility acquires a new transmission line, it selects a transmission line of a particular kV to match its capacity needs. Therefore, when an action plan in a utility's IRP includes the acquisition of a transmission line, the transmission line is described in terms of kV and not MW. Idaho Power also asserts that when, as in this matter, the OPUC acknowledges a 500 kV transmission line (or a transmission line of any size), the acknowledgment includes the entire capacity of the transmission line. Idaho Power Reply at 10-11.

Idaho Power further argues that although it described its capacity needs in terms of MW in the information provided in the ASC to demonstrate compliance with the System Reliability Rule, it was not similarly required to define capacity by megawatts for purposes of the Least-Cost Plan Rule. Idaho Power notes that the System Reliability Rule poses an entirely different question than that raised by the Least-Cost Plan Rule. The former focuses on whether a facility is necessary to fill a reliability need, whereas the latter focuses on the acquisition of the energy facility in a utility company's short term plan of action in an energy resource plan and whether

the OPUC has acknowledged the "acquisition" of the facility's capacity.[9] Idaho Power explains that while it is appropriate to evaluate system reliability needs in terms of MW, it is also appropriate to evaluate the acquisition of capacity in terms of kV, which is how transmission lines under development are rated. *Id.* at 12.

Finally, Idaho Power argues that even if FERC and WECC require that reliability standards be expressed in MW, capacity in terms of megawatts is not material to the OPUC's acknowledgement of a of a least cost plan in an IRP for a transmission line that is under development and/or to the Council's analysis of need for the facility under the Least-Cost Plan Rule. *Id.*

Having considered the above arguments, the ALJ finds that Idaho Power is entitled to a favorable ruling as a matter of law on Issue N-1. The ALJ agrees that, with regard to this issue, there are no relevant facts in dispute. Indeed, the question to be resolved – whether the Department erred in evaluating capacity in terms of kV instead of MW for purposes of the Least-Cost Rule – is a purely legal one.

The ALJ also concludes that the Department did not err in defining capacity in terms of kV for purposes of evaluating the B2H Project's compliance with the Need Standard under the Least-Cost Plan Rule (OAR 345-023-0020). The Council does not define the term "capacity" for purposes of OAR Chapter 345, Division 023. In ORS 469.300(11)(a)(C), capacity is associated with voltage, and not megawatts. In Idaho Power's IRPs addressing the B2H Project, capacity is associated with voltage (a 500 kV transmission line) and not megawatts. In its acknowledgments of the B2H Project as a least cost plan, the OPUC similarly associates capacity with voltage. Accordingly, in the Proposed Order, the Department appropriately considered the operating voltage of the B2H Project in concluding that Idaho Power demonstrated need under the Least-Cost Plan Rule.

4. *Idaho Power's Motion on Issue N-2*

Stop B2H also has limited party status with standing on Issue N-2, which states: Whether in evaluating capacity, the Department applied balancing considerations in contravention of OAR 345-022-0000(3)(d).

In its petition for party status, Stop B2H asserts as follows:

> [T]he ODOE, in their evaluation of the Applicant's compliance with Division 23 Need Standard for Nongenerating Facilities, appears to have erred by applying the balancing rule in violation of EFSC's own General Standards for Siting Facilities []. * * * .

[9] *Compare* OAR 345-023-0030(1) (the facility is needed to enable the transmission system to meet firm capacity demands for electricity or firm annual electricity sales that are reasonably expected to occur within five years of the facility's proposed in-service date) to OAR 345-023-0020(1) and (2) (the facility is identified for acquisition in the short term plan of action of an energy resource plan or combination of plans and the OPUC has acknowledged the least cost plan).

> Despite this clear rule, the ODOE appears to have applied balancing considerations by embracing the Applicant's pleas that awarding a site certificate for which Applicant has only demonstrated the need for 21 percent of the capacity of the Energy Facility is good public policy. * * *.
>
> The ODOE's concurrence with the Applicant's position is contrary to Council's rules, deviates from Council's precedent in previous transmission site certificate applications and ignores the express prohibition against the Council applying the balancing determination to the need standards.

Stop B2H Petition at 6-7.

In its Motion, Idaho Power argues that it is entitled to summary determination in its favor because the Department did not apply balancing considerations in the Proposed Order. Idaho Power noted that, in the Proposed Order, the Department concluded that the ASC demonstrated the need for the proposed facility under the Need Standard. Idaho Power Motion at 15-16.

In its Response to Idaho Power's Motion, the Department concurs with Idaho Power's position, noting that it is consistent with the Proposed Order and the arguments set out in the Department's Motion regarding Issue N-2.

In its Response, Stop B2H argues that "given the failure to follow the letter of OAR 345-023-0030, as implicated by OAR 345-023-0005(1)," IPC and the Department have not demonstrated they are entitled to summary determination as a matter of law in Issue N-2.

In its Reply, Idaho Power restates its position that the Department did *not* apply the balancing considerations set out in OAR 345-022-0000(2) to the Need Standard described in OAR 345-023-0005, because Idaho Power satisfied the Need Standard through OPUC's acknowledgment of Idaho Power's IRP.

The ALJ finds that Idaho Power is entitled to a ruling in its favor for the reasons set out above. It is undisputed that, in the Proposed Order, the Department found that Idaho Power demonstrated the need for the facility under OAR 345-023-0020(2) based upon the OPUC's acknowledgement of Idaho Power's 2017 IRP. The Department did not apply balancing considerations to the Need Standard, and did not act in contravention of OAR 345-022-0000(3)(d).

5. *The Department's Motion on Issue N-2*

In its Motion on Issue N-2, the Department similarly argues that it did not apply or recommend that Council apply the balancing determination under OAR 325-022-0000(2) to the Need Standard of OAR 345-023-0005 in contravention of OAR 345-022-0000(3)(d). The Department notes that, "[t]o the contrary, based on the evaluation in the Proposed Order, the Department has recommended Council find the proposed facility would satisfy OAR 345-023-0005." Department Motion at 11.

For the reasons previously explained, the ALJ finds that the Department is also entitled to a ruling in its favor on Issue N-2. The Department did not apply balancing considerations to the Need Standard in contravention of OAR 345-022-0000(3)(d).

6. *Idaho Power's Motion on Issue N-3*

Stop B2H also has limited party status with standing on Issue N-3: Whether Applicant demonstrated need for the proposed facility when Applicant has only shown that its needs represent 21 percent of the total capacity.

In its Petition, Stop B2H argues that Idaho Power failed to meet the Need Standard under either the Least-Cost Plan Rule or the System Reliability Rule "because the OPUC only acknowledged Idaho Power's 21% capacity share of the proposed transmission line." B2H Petition at 4. B2H asserted as follows:

> The standards require Applicant to demonstrate need for the capacity of the facility. Although the applicant claims it has "partners" that need the remaining 79% of the capacity of the proposed transmission line, there is no evidence in the record that these proposed partners have such need, nor have these proposed "partners" appeared or corroborated the Applicant's claims in these proceedings, nor did they do so in the proceedings leading to acknowledgement by the OPUC of the proposed transmission line in the Applicant's 2017 IRP. It is a clear violation of EFSC rules for the ODOE to embrace the Applicant's speculative claims of need for the project's capacity based on unsubstantiated claims that there are other partners [that] need the remaining capacity, a need that was expressly <u>not acknowledged by the OPUC</u> in Idaho Power's 2017 IRP.

B2H Petition at 7, emphasis in original.

In its Motion, the Department argues that it is entitled to a favorable ruling as a matter of law on Issue N-3 because: (1) the OPUC's acknowledgement concerned the entire 500kV line, not specific MW of capacity; (2) the Least-Cost Plan Rule does not require evaluation of the need for a project according to MW of capacity, but rather consideration of the project as a whole; and (3) whether Idaho Power's partners on the B2H Project have independently established their need for their respective shares of the line's capacity is irrelevant to Idaho Power's ASC. Idaho Power Motion at 9-11.

The Department, in its Response on Issue N-3, states its support for a ruling in Idaho Power's favor.

In its opposition to Idaho Power's Motion, Stop B2H argues that because OAR 345-023-0020(1) requires a finding that "*the* capacity" of the proposed facility be identified for acquisition in the short-term action plan, acquisition of part or some of the capacity is not all of the capacity of the proposed facility and does not satisfy the rule's requirement. Stop B2H contends that because Idaho Power has only identified approximately 21 percent of the capacity for acquisition, Idaho Power cannot satisfy the Least-Cost Plan Rule. Stop B2H Response at 11.

Stop B2H argues: "[t]he fact remains that [Idaho Power] never presented load-resource tables for the entire area to be served by the transmission line." *Id.* at 8. Stop B2H proclaims, "[t]here are no other partners with acknowledged short-term plans of action that identify for acquisition or claim the additional 79% of 'the capacity' of this transmission line. Given that, ODOE's finding that the criteria under OAR 345-023-0020(1) was met is incorrect as a matter of law." *Id.*

In its Reply, Idaho Power argues that the OPUC's acknowledgement of the B2H Project approved the transmission line *as a whole* – all 500kV of the line – and not a smaller line or some portion of the proposed project's capacity. In support of this contention, Idaho Power references the OPUC's statement acknowledging the B2H Project in Idaho Power's 2019 IRP.[10] Idaho Power argues that given the description of the B2H Project as a "500 kV transmission line" in the 2017 IRP and the 2019 IRP, the OPUC's acknowledgment approved Idaho Power's acquisition of the entire capacity of the transmission line. Idaho Power Reply at 4-6. Idaho Power also asserts that Stop B2H's argument is based on a misreading of the Council's rules. Idaho Power notes that the detailed information an applicant must provide to establish need under the System Reliability Rule (including load-resource balance tables and firm capacity demands) is not pertinent to, and not required to demonstrate compliance with, the Least-Cost Plan Rule, as Idaho Power has done in this matter. *Id.* at 7-9.

The ALJ finds that Idaho Power is entitled to a favorable ruling as a matter of law on Issue N-3. There is no dispute that the OPUC acknowledged the B2H Project action items in Idaho Power's 2017 IRP and affirmed its acknowledgment of the B2H Project action items in Idaho Power's 2019 IRP. The OPUC acknowledged a "500 kV transmission line with the partnership arrangement as described by Idaho Power" as opposed to "only Idaho Power's 21 percent of a 2,050 MW bi-directional transmission line." *See* OPUC Order 21-184 at 13-15, Idaho Power Reply, Exhibit A. Because the OPUC has acknowledged the B2H Project as a whole, Idaho Power has demonstrated need for the proposed facility under OAR 345-023-0005(1) and OAR 345-023-0020(2). The bottom line is that the B2H Project satisfies the Need Standard for nongenerating facilities under the Least-Cost Plan Rule, regardless of the percentage of megawatt transmission capacity needed for Idaho Power's customers.

7. *Conclusion*

For the reasons stated above, there are no material facts in dispute with regard to the Department's determination in the Proposed Order that Idaho Power demonstrated the need for the facility under OAR 345-023-0005(1) and OAR 345-023-0020(2). Idaho Power is entitled to

---

[10]As found above, in Order No. 21-184, the OPUC stated:

> In response to comments for clarification from STOP B2H, we will allow the 2017 IRP Order to speak for itself. We affirm here that we acknowledge the B2H project action items in this IRP, which are applicable to the proposed project as it is presented in the company's Second Amended 2019 IRP, which includes a 500 kV transmission line with the partnership arrangement as described by Idaho Power.

Idaho Power Reply, Exhibit A, Order No. 21-184.

a favorable ruling, as a matter of law, on Contested Case Issues N-1, N-2, and N-3. In addition, the Department is entitled to a favorable ruling as a matter of law on Issue N-2.

RULINGS AND ORDER

Idaho Power's Motion for Summary Determination on Contested Case Issue N-1 is GRANTED;

Idaho Power's Motion for Summary Determination on Contested Case Issue N-2 is GRANTED;

The Department's Motion for Summary Determination on Issue N-2 is GRANTED; and

Idaho Power's Motion for Summary Determination on Contested Case Issue N-3 is GRANTED.

Issues N-1, N-2, and N-3 are DISMISSED from the contested case.

Alison Greene Webster
Senior Administrative Law Judge
Office of Administrative Hearings

NOTICE OF RIGHT TO INTERLOCUTORY APPEAL PURSUANT TO OAR 345-015-0057

If this ruling terminates the right of a limited party to participate in the contested case proceeding, the limited party may take an interlocutory appeal to the Council pursuant to OAR 345-015-0057(1).

Pursuant to OAR 345-015-0057(2), the limited party shall submit an appeal involving the limited party's right to participate in this contested case proceeding, with supporting arguments and documents, to the Council within seven (7) calendar days after the date of service of this ruling.

CERTIFICATE OF MAILING

On July 29, 2021, I mailed the foregoing RULING AND ORDER ON MOTIONS FOR SUMMARY DETERMINATION OF CONTESTED CASE ISSUES N-1, N-2, AND N-3 issued on this date in OAH Case No. 2019-ABC-02833**.**

By: First Class Mail:

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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF OREGON

for the

OREGON DEPARTMENT OF ENERGY

IN THE MATTER OF:	)	**IRENE GILBERT'S PETITION FOR RECONSIDERATION OF THE DECISION ALLOWING SUMMARY DETERMINATION DENYING MY CONTESTED CASE LU-5**
	)	
THE APPLICATION FOR SITE CERTIFICATE FOR THE BOARDMAN TO HEMINGWAY TRANSMISSION LINE	)	
	)	
	)	
	)	OAH Case No. 2019-ABC-02833
	)	
	)	

Motion for reconsideration of the Summary Determination denial of issue LU-5. A failure to promptly address errors in this decision impact multiple other denials of Contested Cases directly and indirectly related to the incorrect determination that the land containing resources was agricultural land rather than forest land. A failure to address this issue immediately will severely prejudice the public in multiple other contested cases as well as this one due to different standards applying to resources on forest land as opposed to agricultural land. This decision results in a waiver of state law and the use of interpretation of rules to broadly that they include factual disputes that exist regarding the issue. In addition, the Oregon Department of Land Use was not contacted in this case prior to making a decision on their rules and statutes.

The ODOE siting process files contain significant amounts of documentation showing the failure of the evaluation to comply with state law. I have been denied the ability to reference that information in this proceeding due to my inability to use the procedure required to identify and reference any material that ODOE has in their files. I intended to hire someone to locate the documents that should be referenced prior to submitting my contested cases. While I have objected to the action and the resulting cost and challenge it creates for anyone participating in the contested case process, my requests to allow procedures used in other agency and civil proceedings have been denied. This denial has denied me the ability to reference materials from the agency files.

Some Issues to be addressed:

The hearings officer failed to comply with Oregon Statutes:

ORS 469.504 Requires compliance with statewide land use goals

-- 527.722 Requires "all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special district shall be in compliance with the goals within one year after the date those goals are approved by the Land Conservation and Development Commission. In the event that the local Ordinances are not updated, such as this, the statutes require the use of the procedures in the law anyway. Scott Hartell confirmed that the Union County Ordinances had not been update.

--Failure to use state rules as specifically required by the statutes means that all reliance on Union County Ordinances amounted to a waiving of state law which is specifically excluded by statute.

There is no agreement that the developer used SSURGO information as required by law in their determination. It is documented that they failed to do so when they used 63 cfay rather than 20 cfay. The hearings officer allowed a different methodology by claiming that the requirement to determine forest land by use of SSURGO data was limited to soils capable of producing 63 cubic feet of timber per acre per year, rather than including soils capable of producing timber of 20 cubic feet per acre per year as is required. The county planner and Idaho Power failed to determine soil capacity of over 50% of the area in the zone.

The courts support the requirement that the LCDC rules must be applied:

"Rogue Advocates v. Josephine County, 66 Or LUBA 45 (2012) "the rules provide a set of prioritized, mandatory sources of data and a prescribed alternative method that must be used to determine whether land is forest land subject to Goal 4, the determination cannot be avoided by concluding, based on different data or different methodology, that land is not forest land subject to Goal 4 definition."

The order indicates there is agreement on factual issues which I do not agree with and which are clearly shown in my previous documents.

--There is not agreement that the county and Idaho Power companies incorrect inclusion of Predominant use in their analysis of "forest land" would not change the outcome of the analysis provided. The correct evaluation of soils data would significantly change and increase the area of forest land, and applying a "predominant use" decision to this land would illegally reduce the land designated as "forest land". Any such action would raise an issue of material fact just as this argument was presented in my objections to a Summary Determination Regardless of whether or not the developer and the county want to spin the rules, the use of Predominant Use cannot exclude land that meets the forest land designation based on soil class.

The hearings officer's statements supporting Idaho Power are without factual basis. They are both incorrect and represent a failure to consider my arguments in opposition. The statements in Paragraph 22 supporting Idaho Power fail to consider my comments on Page 5 of my objection to Summary Determination. I document the fact that the analysis failed to identify the capacity to produce trees of all soils in the timber/grazing zone and provided a court decision supporting this. On page 7 of my response, I referenced Mr. Hartell's deposition stating that the only soils capacity information he used was that in the 1993 document, and that no other soils were evaluated by him. I clearly made the statement on page 7 relating to the use of 63 cfay stating, "No soils with a cubic foot per acre timber production capacity between 20 amd 63 were considered to be "forest land" under Goal 4. In addition, I stated multiple errors in the document that was relied upon which also support the statement that the evaluation was not consistent with state law. " This fails to comply with the

statute, the rules and appeal court decisions stating that the counties cannot override the statute in identifying land that is considered "forest Land." I cited several statute and rules that were not being complied with, and even more significant is the fact that I provided reference to court decisions interpreting the statutes and rules applying to this situation.

State law required the updating of the Union County Plan and it was clearly documented that this did not occur. The Oregon Statutes require reliance on state law since the Union County Ordinance was documented as not having been updated but this was not done. In addition, any argument that the rules related to Goal 4 land listed in the rules only apply if there is an amendment is not a valid argument due to the fact that the statutes REQUIRED an amendment.

I am requesting a full review and reconsideration of the order supporting Summary Determination regarding my issue LU-5. I should not be required to assume the legal costs of appealing a decision that to obviously fails to comply with state law regarding evaluation of LCDC Goal 4 resources. In addition, in the event that I am required to appeal this decision, it will delay construction of the transmission line in order to reassess the decisions that have been made regarding impacts to forest land and the resources located on that land which have not been evaluated as a Conditional Use..

For the above reasons, and many others, I am requesting that the decision on this contested case be reconsidered and recommend that the Council be involved in that decision.

Please include as supporting documents:

1. My motion objecting to allowing the Oregon Department of Energy to define the Contested Case Issues.
2. My emails submitted identifying and listing errors in the order on Summary Determinations.
3. My request that the hearings officer be removed and the actions supporting that request.

CERTIFICATE OF MAILING

On July 28, 2021 I mailed the foregoing **IRENE GILBERT'S PETITION FOR RECONSIDERATION OF THE DECISION ALLOWING SUMMARY DETERMINATION DENYING MY CONTESTED CASE LU-5**

issued on July 28, 2021 OAH Case No. 2019-ABC-02833**.**

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_____/s/_____

Irene Gilbert

Pro Se Petitioner

From: Irene Gilbert
Sent: Tuesday, July 27, 2021 12:44 AM
To: OED_OAH_REFERRAL * OED; Borg Emma T
Cc: dstanish@idahopower.com; lisa@mrg-law.com; jocelyn@mrg-law.com; jstippel@idahopower.com; kga@integra.net; TARDAEWETHER Kellen * ODOE; sam.myers84@gmail.com; mike@oxbowlaw.com; deschnerwhit@yahoo.com; susanmgeer@gmail.com; charlie@gillis-law.com; mcgccarb@bendbroadband.com; dutto@eoni.com; moyald@gmail.com; lkathrynandrew@gmail.com; jerryhampton61@gmail.com; ken_marsha@comcast.net; staciajwebster@gmail.com; cndyrela@eoni.com; garymarlette@yahoo.com; danno@bighdesign.biz; joehorst@eoni.com; dirtfarmerjohn@gmail.com; dmammen@eoni.com; ncimon@oregontrail.net; tranquilhorizonscooperative@gmail.com; mcooperpiano@gmail.com; diannebgray@gmail.com; onthehoof1@gmail.com; owyheeoasis@gmail.com; marvinroadman@gmail.com; sbadgerjones@eoni.com; loisbarry31@gmail.com; suzannefouty2004@gmail.com; candrew@eou.edu; wildlandmm@netscape.net; rutnut@eoni.com; amarch@eoni.com; fuji@stopb2h.org; petebarry99@yahoo.com; kskovlin@gmail.com; squirel@eoni.com; browner@eou.edu; amorter79@gmail.com; d.janehowell@gmail.com; lotusbsilly@eoni.com; jondwhite418@gmail.com; alisha@mrg-law.com; wintersnd@gmail.com; nichole.milbrath@centurylink.com; samhartley57@gmail.com; Rowe Patrick G; suemc@eoni.com; carlmorton2000@gmail.com; jkreider@campblackdog.org; Ratcliffe Jesse D; ESTERSON Sarah * ODOE; Seeley Jeffery; BENNER Janine * ODOE; CORNETT Todd * ODOE
Subject: Re: Request that Counsel remove Ms. Green Webster as hearings officer for the Boardman to Hemingway Transmission Line
Attachments: LU-5 FOREST definitio my objection.doc
LU-5 Union county forest cfac chart 1993.docx
motion for removal of Ms. Webster as hearings officer for B2H.docx

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On Monday, July 26, 2021, 08:37:31 AM PDT, Irene Gilbert <ott.irene@frontier.com> wrote:

This request is directed toward the Energy Facility Siting Council Members. I am requesting that Janine Benner or Todd Cornett forward the request to the members of the council.

It appears that a failure to share it with contested case participants would be considered an ex parte communication due to the need to present evidence of Ms. Websters actions and decisions supporting my request.

Having just spent a couple of hrs. researching the Oregon Rules ORCP 47 Summary Judgement and the interpretations by the court of the EXTREME CIRCUMSTANCES where a Summary Determination can legitimately be \granted, I am even more confident that the decisions being made show an incredibly biased use of this procedure that denies legitimate Contested Case issues from being heard. For example in Bridgeview Vineyards, Inc. v. State Land Board 258 Or App 351 (2013) it is stated "In the absence of such an agreement or concession (by the parties) summary judgement is not permissible if the party opposing summary judgment demonstrates that there are factual disputres going to the merits of the challenged agency decision." Ms. Webster states "facts" that o nly she and Idaho Power or the Oregon Department of Energy believe are facts.

From: Irene Gilbert
Sent: Tuesday, July 27, 2021 3:02 AM
To: OED_OAH_REFERRAL * OED; Borg Emma T
Cc: dstanish@idahopower.com; lisa@mrg-law.com; jocelyn@mrg-law.com; jstippel@idahopower.com; kga@integra.net; TARDAEWETHER Kellen * ODOE; sam.myers84@gmail.com; mike@oxbowlaw.com; deschnerwhit@yahoo.com; susanmgeer@gmail.com; charlie@gillis-law.com; mcgccarb@bendbroadband.com; dutto@eoni.com; moyald@gmail.com; lkathrynandrew@gmail.com; jerryhampton61@gmail.com; ken_marsha@comcast.net; staciajwebster@gmail.com; cndyrela@eoni.com; garymarlette@yahoo.com; danno@bighdesign.biz; joehorst@eoni.com; dirtfarmerjohn@gmail.com; dmammen@eoni.com; ncimon@oregontrail.net; tranquilhorizonscooperative@gmail.com; mcooperpiano@gmail.com; diannebgray@gmail.com; onthehoof1@gmail.com; owyheeoasis@gmail.com; marvinroadman@gmail.com; sbadgerjones@eoni.com; loisbarry31@gmail.com; suzannefouty2004@gmail.com; candrew@eou.edu; wildlandmm@netscape.net; rutnut@eoni.com; amarch@eoni.com; fuji@stopb2h.org; petebarry99@yahoo.com; kskovlin@gmail.com; squirel@eoni.com; browner@eou.edu; amorter79@gmail.com; d.janehowell@gmail.com; lotusbsilly@eoni.com; jondwhite418@gmail.com; alisha@mrg-law.com; wintersnd@gmail.com; nichole.milbrath@centurylink.com; samhartley57@gmail.com; Rowe Patrick G; suemc@eoni.com; carlmorton2000@gmail.com; jkreider@campblackdog.org; Ratcliffe Jesse D; ESTERSON Sarah * ODOE; Seeley Jeffery; BENNER Janine * ODOE; CORNETT Todd * ODOE
Subject: Re: Request that Counsel remove Ms. Green Webster as hearings officer for the Boardman to Hemingway Transmission Line

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I am working on my complaint to the Oregon Bar, and every time I look at a page of the Order I referenced in my request for Ms. Webster to be removed I am astounded at the kinds of statements she makes and pretends that whatever Idaho Power says is "fact" and our disagreements with their statements are not, even when the documents are right in front of her.. Apparently Ms. Webster missed the part of the Summary Determination rules she is supposed to be addressing includes the requirement that there not be disputes regarding facts. Ms Webster did not even do us the courtesy of issuing a separate order for the 4 contested cases she intends to throw out without allowing any of us to argue our issues or provide the mountain of additional documentation supporting our cases. (Another requirement of Summary Determinations in Oregon law is that a summary determination cannot be made unless there is no additional documentation or evidence that could be provided to support our arguments) What made this woman believe that she would be able to throw out most or all of

the contested cases that the developer or the department of energy expect there is a good chance they will be overrulled on? Apparently she and the developer are relying upon the fact that her actions will make appeal even more costly. and there is a decent chance that our cases will be upheld.. I can understand that given the recent court decisions where the Oregon Supreme Court did not support abuses of power on the part of the department, they would be fearful regarding the possibility that the petitioners would access the funding to appeal the most aggreageous decisions.,
A couple of additions to the long list of unjustified reasons Ms. Webster cooked up to deny my access to a Contested Case and which are also reflected in other denials she has issued to date.
1. She relied entirely on the use of the issue statement developed by the Oregon Department of Energy which does not accurately reflect the full contested case I was authorized for. My concern that she might do this was addressed in my objection by writing the entire request which I was approved for to assure she would not treat the ODOE interpretation as complete.
2. She allowed Idaho Power to completely skip providing idocumentation or justification for not using the methods Ms. Andrew listed and whch are included in the Land Use Rules. The items they "skipped" are things like the requirement to "identify soils composed of existing and potential forest lands which are suitable for commercial forest use". Makes further statements she calls "facts" such as "Morgan Lake Park is not classified as Goal 4 land and claims this is an undisputed fact. Contrary to this statement, it is very much disputed by both Ms. Andrew and myself in the Summary Determinations which are in this document. The hearings officer chose not to deal with the fact that Idaho Power's statements of "fact" are not consistent with either Ms. Andrew or my own statements of "fact", and our arguments included documentation, Oregon Statutes, rules and court decisions supporting them. Ms. Webster chose to ignore the requirement stating that No Summary Determination can be issued unless there is NO ISSUE OF FACT. Clearly there are multiple issues of fact such as, the Fact that idaho Power says they can use the Union County Rules to determine forest land and Ms. Andrew and I have stated the Fact that the Oregon Satute must be used and provided state law to support it. Idaho Power claimed without any documentation that the use of a local county rule and document showing only land with soil capacity of 63 cubic feet per acre per year is what is required to identify forest land. Both Ms. Andrew and I documented that the statutes require land must have the soil capacity identified and land capable of 20 cfay is considered forest land I could fill this page with "facts" with a timber capacity of 20 cubic feet per acre states it is a even though the Oregon Statutes say y were equired to update their rules within one year of the 2008 and 2011 statutes requiring the identification of forest land based on the soils capacity to produce timber. I am, frankly, amazed at the blatant preferential actions up to and including acting as if the Oregon Statutes do not exist, even when they are cited in our arguments,

Why weren't we given the opportunity for oral arguments as this appears to be included in a typical Summary Determination procedure?
Why weren't we provided our appeal rights when Ms, Webster denied us the opportunity to have contested cases on issues we had previously been approved for?

Please add the above information to the documentation supporting the need to remove this lady from the role of Hearings officer.

On Tuesday, July 27, 2021, 12:44:28 AM PDT, Irene Gilbert <ott.irene@frontier.com> wrote:

On Monday, July 26, 2021, 08:37:31 AM PDT, Irene Gilbert <ott.irene@frontier.com> wrote:

This request is directed toward the Energy Facility Siting Council Members. I am requesting that Janine Benner or Todd Cornett forward the request to the members of the council.
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